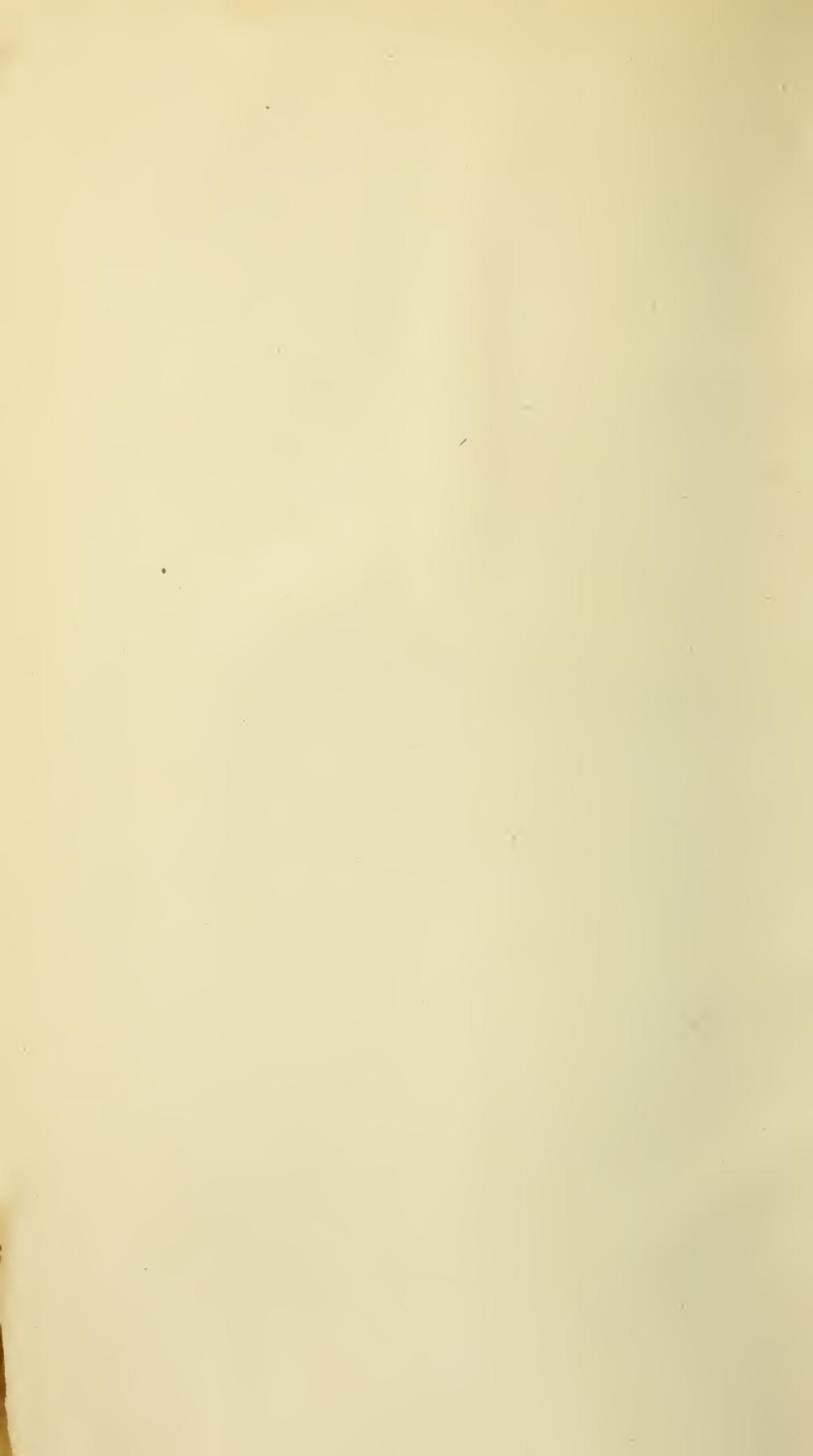




Mr. Arthur







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REPORTS OF CASES

DECIDED IN

COMMON LAW CHAMBERS, CHANCERY
CHAMBERS, AND THE MASTER'S
OFFICE.

BY

W. E. PERDUE AND T. T. ROLPH,

BARRISTERS-AT-LAW AND REPORTERS TO THE COURTS.

CHRISTOPHER ROBINSON, Q.C.,

EDITOR.

VOL. VIII.

CONTAINING THE CASES DETERMINED
FROM THE 3RD MARCH, 1879, TO THE 22ND JUNE, 1881,
WITH A TABLE OF THE NAMES OF CASES REPORTED,
A TABLE OF THE NAMES OF CASES ARGUED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

TORONTO :
ROWSELL & HUTCHISON.
1882.

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REPORTS OF CASES DECIDED

IN

PRACTICE COURT, COMMON LAW CHAMBERS,
CHANCERY CHAMBERS, MASTER'S OFFICE.

COMMON LAW CHAMBERS.

STRANGE v. TORONTO TELEGRAPH COMPANY.

Interpleader—Superior and County Court—Jurisdiction.

Held, that in case of interpleader by a sheriff between two claimants, one a plaintiff in a Superior Court suit, the other a plaintiff in a County Court suit, the application for an interpleader order was properly made in the Superior Court, although the seizure was made under the County Court writ before the Superior Court writ came into the sheriff's hands.

[March 3rd, 1879.—Mr. Dalton.]

The plaintiff in a County Court suit of *Henderson v. Toronto Telegraph Co.* had recovered judgment, and had placed a writ of *fieri facias* against the goods of the defendants in the hands of the sheriff of York. The sheriff made a seizure under this writ, but before he sold, the plaintiff in a suit in the Common Pleas by one Strange against the same defendants recovered judgment, and also placed a writ of *fi. fa.* against the defendants' goods in the same sheriff's hands. After sale the plaintiff in the Superior Court action laid claim to the proceeds in the sheriff's possession, alleging that the plaintiff in the County Court suit had obtained his priority by fraud.

Aylesworth, for the sheriff, applied for an interpleader summons.

MR. DALTON.—I will grant the summons. The application is properly made in the Superior Court, and not in the County Court, under R. S. O., ch. 54, secs. 10-12.

ROGERS v. MANNING.

Evidence—Commission—Further examination of witness.

Where a witness who had been previously examined under a commission stated on affidavit that he had further evidence to give to explain or correct his former evidence—*Held*, a new commission should issue to further examine him, and that in such case he should be considered as a witness for the party who desires to so re-examine him.

Held, also, that strong suspicion of a depraved motive in the witness for desiring to be re-examined, was not a sufficient ground upon which to resist the application.

[March 5th, 1879.—*Hagarty, C. J.*]

A commission had been issued in this cause on the 28th November, 1878, for the examination of one W. H. S. Coen as a witness on behalf of the defendant, which examination had duly taken place in the presence of the counsel for both parties, and had been returned to the Court.

March 1, 1879, *C. R. W. Biggar* obtained a summons, calling on the defendant to shew cause why an order should not be made for the further cross-examination and re-examination of the witness under the commission, or why a new commission should not issue for that purpose. He produced an affidavit from Coen, stating that his examination and cross-examination under the former commission were *viva voce*, and had lasted several hours, and involved a number of matters which had occurred a long time previous, and as to which he had, at the time of such examination, no opportunity of refreshing his memory by reference to books or entries made at the time when the

facts deposed to had occurred. He further stated that since his attention had been directed to these matters, he had tried to recollect everything in connection with them, and had also had means of refreshing his memory by reference to letters written at the time. He now saw, as the affidavit stated, that his evidence upon several matters, which he specified, was incomplete and calculated to convey a wrong impression as to the facts. He further averred that he desired to correct his evidence in these particulars, and offered to attend at the place where he had been previously examined, for re-examination under the same or another commission.

Affidavits were filed in answer, shewing that at the time of his examination the witness had had books and papers before him containing entries and memoranda made at the time when the circumstances in question occurred, and that he used and referred to these upon his evidence: that the witness at the examination stated positively that he had destroyed all the papers in his possession relating to the matters in question: that he was examined and cross-examined at great length, and the points which he indicated in his affidavit fully dwelt upon: that he was fully informed at an interview with the defendant and his attorney, long previous to the examination, upon what points his evidence would be required, and his attention was then specially directed to those very matters he now speaks of as unexpected: that after his examination was taken under the commission he demanded a large sum of money from the defendant for the evidence he had given, and made threats as to what he would do if his demands were not complied with. It was also shewn that the statements already made by the witness upon his examination were corroborated by one of the plaintiffs who had been examined under the A. J. Act, and also by the documentary evidence in existence.

Shepley shewed cause. There is no authority for an application of this sort. The witness, Coen, having already been examined in the presence of and subject to cross-

examination by counsel for both parties, the application ought not to succeed, unless the strongest reasons are shown. Here the grounds upon which the evidence is asked to be re-taken are too vague and are altogether unsupported by proofs. The papers, upon reference to which he says he has been induced to vary his evidence, and to which he says he had not had access when previously examined, ought to be before the Court. The affidavits in answer shew conclusively that there are no such papers in existence, that on the contrary books and papers were before him and used by him during his examination, and that the present application proceeds from the witness himself, for the purpose of being revenged upon the defendant who refused to respond to his attempts at blackmail. When a depraved motive is so clearly shown, the Court will not encourage such an application. The former commission cannot in any case be re-opened. He was then the defendant's witness, and a new commission, if any order be made, must issue, so as to put the plaintiffs in the position of assuming all the responsibility of making Coen their own witness.

C. R. W. Biggar, in support of the summons. The allegation that the witness was influenced by improper motives in desiring to correct his evidence is not proved, and even if it were, it is no reason for excluding his evidence. It is a matter affecting only the value, not the materiality of his testimony, or his competency as a witness. In so far as it affects the value of his evidence, it is not only a proper matter to come before the Judge at the trial, but one which justice requires to be disclosed. The case is precisely similar to recalling an adverse witness after he has left the box, on discovering either from him or from some one else, the circumstances under which he has given his testimony. Whether he be made the witness of the plaintiffs or not is immaterial, as in any case he will be considered a witness adverse to them, and the defendants cannot discredit him by general evidence of character, without destroying the value of the evidence he has given for them.

MR. DALTON, after conferring with HAGARTY, C. J., and ARMOUR, J.—The order must go for a new commission to further examine and cross-examine Coen as a witness for the defendant. If the witness has, as he states, further evidence to offer, it should be brought before the Court, and his whole evidence there considered together upon its merits.

From this order *Shepley* appealed. The appeal was heard before HAGARTY, C. J., who varied the order by directing that the witness be examined under the new commission as a witness for the plaintiffs. In all other respects the order was upheld.

IN RE STOGDALE AND WILSON.

Division Court—Prohibition—Jurisdiction—Abandonment of excess.

The plaintiff sued the defendant in the Division Court for \$100, and endorsed on the summons as particulars a promissory note for \$125. Held, that the plaintiff might at the trial abandon in his particulars the excess above \$100, so as to bring the case within Division Court jurisdiction.

[March 11, 1879—*Hagarty, C. J.*]

THE plaintiff, Stogdale, sued the defendant, Wilson, in the fourth Division Court of the County of Simcoe, stating his claim in the summons to be \$100. The plaintiff endorsed on the summons as particulars a promissory note for \$125. At the trial the defendant objected to the jurisdiction, and the plaintiff offered to abandon \$25 of the amount stated in the particulars of claim, so as to bring the suit within Division Court jurisdiction. An amendment accordingly was allowed by the Judge, and the trial postponed, to allow the defendant to be re-served. At the second trial the objection was renewed, but was over-ruled, and a judgment for \$100 entered in favour of the plain-

tiff. A summons for a prohibition to the Division Court was taken out by the defendant, and now came on for argument.

Wilson (Morrison, Wells & Gordon,) in support of the summons, contended, upon the authority of *Re Mackenzie and Ryan*, 6 P. R. 323, that the excess should have been abandoned when the action was brought, and that the abandonment of a part of the claim at the trial, or subsequent to the first service of the summons, could not be allowed.

Shepley showed cause. *Re Mackenzie and Ryan* is not in point. In that case the claim never was within the jurisdiction of the Division Court, inasmuch as it was for a balance of \$200, and even if the abandonment had been made at the proper time, this objection would not have been obviated, and the cause would still have been without the jurisdiction : *Isaac v. Wyld*, 7 Ex. 163 ; *Higginbotham v. Moore*, 21 U. C. R. 326. But in this case no such question arises. If the abandonment be allowed, there is clearly jurisdiction. At all events there was sufficient abandonment in the summons, which only claimed \$100, while the particulars merely shewed that the claim of \$100 was by virtue of a note for \$125. It is not necessary that there should be a formal abandonment in the particulars, so long as the summons itself shows jurisdiction. The Judge had power to allow the amendment, this being a matter of practice. The plaintiff's claim will be barred by the Statute of Limitations if a prohibition be ordered, and no merely technical objection should be allowed to prevail, the defendant showing no merits.

HAGARTY, C. J.—The plaintiff, by putting his claim at \$100 in the summons, no doubt intended to abandon the excess of the claim, as stated in the particulars. I do not consider myself bound in this case by *Mackenzie v. Ryan*, the facts being different. I refuse the prohibition, and discharge the summons, but without costs, as the defendant moved on the authority of the case cited.

DAVIS V. DENNISON.

Dower—Death of tenant of freehold—Scire facias.

A plaintiff in an action for dower recovered judgment, but before the execution of the writ of assignment of dower, and after its issue, the tenant of the freehold died, having devised the land in question to the present defendant.

Held, that the plaintiff must proceed against the devisee by *scire facias*, and not by suggestion or revivor.

[March 4th, 1879.—*Hagarty, C.J.*]

PLAINTIFF's husband having died in 1867, she sued out a writ of dower in 1873, and recovered judgment for her dower. After the issue of the writ of assignment of dower, and before its execution, the tenant of the freehold died, having devised the land in question to his wife, the present defendant, for life. Plaintiff then applied in Chambers for leave to revive the suit against the devisee, by suggestion or revivor. This was refused, Mr. Dalton saying: "I think this is not a case for suggestion or revivor, but that the plaintiff's remedy is by *scire facias*."

On the 30th of August, 1878, the plaintiff issued a writ of *scire facias*. In November following *T. P. Galt* obtained a summons calling upon the plaintiff to shew cause why the writ of *scire facias* should not be set aside on the ground that there was no authority for its issue in this case. On return, *Tate Blackstock* shewed cause; *T. P. Galt* supported the summons.

Mr. DALTON.—This is a real action, and *scire facias* lies under the circumstances at common law. It is laid down in the practice that it is doubtful what course should be pursued against heir or terretenants; *Arch. Prac.* 1127. There are no negative words in the statute, so that I do not see what takes away the *sci. fa.*, even if revivor would apply to this case. Upon the whole, after looking into this matter to the best of my ability, I think *scire facias* is not taken away, and that probably it is the only remedy. I therefore discharge the summons with costs.

In March, 1878, *Creelman* obtained a summons from Galt, J., in Chambers, to rescind Mr. Dalton's order. The summons came on for argument before Hagarty, C. J.

Tate Blackstock shewed cause. The Dower Act makes no provision for such a case as this. The appropriate common law remedy was *scire facias*, and the writ is applicable in this case: *Foster on Sci. Fa.*, 2, 6; also Coke's opinion in the note to page 5. The process by suggestion or revivor is only applicable to personal actions. This view is strengthened by the fact that there was always a remedy at common law by *scire facias* in real actions, whereas there was none in personal actions; *Arch. Prac.*, 12th Ed. 1140. The writ is properly issued against the devisee of the tenant of the freehold; 2 Wms. Saund. 16. Even if suggestion or revivor would apply to this case, they are only cumulative remedies, and do not take away the remedy by *sci. fa.*. Defendant should have raised this question by demurrer, not by summons.

Creelman contra. Plaintiff's only remedy is to commence a new action for her dower. Having invoked the aid of the Dower Act, she cannot pursue other remedies, or import into the Dower Act a practice unknown to it. The law is discussed in *Harrison v. Gwatkin*, 36 U. C. R. 482. The defendant has been improperly introduced into this action. As to the form of the writ, see *Kelly on Sci. Fa.*, 242, 243. This question is properly raised by summons in Chambers.

HAGARTY, C. J.—This is an application to rescind Mr. Dalton's order discharging a summons to set aside a writ of *scire facias*.

In an action of dower the plaintiff recovered judgment for her dower. Before assignment of dower or execution, the original defendant died, devising the estate to this defendant.

I agree with Mr. Dalton that the application must fail, and that this is the proper remedy.

Many of the authorities bearing on the point are collected

in *Harrison v. Gwatkin*, 36 U. C. R. 482, and I need not repeat them here.

I also refer to Com. Dig. Pleading, 3 L. 4, shewing that it lies on a judgment in a real action, and in a judgment in ejectment. *Ib.* 3 L. 1, 3 L. 13. As to judgment against an heir or terretenant, see also 2 Salk. 600; 2 Wms. Saund. 16, note 4; *Ib.* 230, *Ib.* 234, "the rule is that when a new person, who is not a party to the judgment, derives a benefit by, or becomes chargeable to the execution of it, there must be a *sci. fa.* to make him a party to the judgment."

A devisee of the person against whom the dowress has obtained judgment for her dower, would seem to be fully within this definition.

I see no ground for the application to set aside the *sci. fa.* It is an *action*, as has been often held, and a defence to it should be, I think, either by demurrer or plea.

I discharge the application with costs.

THURSTON v. BREARD.

Pleading—Replevin—Form of Counts—Replevin Act,

In an action of replevin the sheriff replevied part of the goods, and certified in his return to the writ that the remainder had been eloigned to places unknown before the writ came into his hands. The plaintiff declared in two counts. 1. For that the defendant unjustly detained the goods of the plaintiff, specifying the goods replevied, until, &c. 2. For that the defendant unjustly detained and still detains, against sureties and pledges, the goods of the plaintiff, specifying the goods eloigned.

Held, under R. S. O., ch. 53, sec. 24, that the second count was maintainable; that the two counts were properly joined, and that the declaration was not open to objection.

[March 28th, 1879.—*Hagarty, C. J.*]

IN an action of replevin, the sheriff made his return to the writ that he had replevied the greater part of the goods, specifying them, and as to the residue of the goods he certified that before the coming of the writ to his hands, they were eloigned to places unknown.

The plaintiff declared in two counts: 1st. For that the defendant unjustly detained, the goods of the plaintiff, specifying the goods replevied, until, &c.; and 2nd. For that the defendant unjustly detained, and still detains against sureties and pledges, the goods of the plaintiff, specifying the goods eloigned.

Holman for the defendant, obtained a summons to strike out the second count of the declaration as being joined improperly with the cause set out in the first count, or to set aside the declaration and copy and service, or the copy and service, for irregularity in that the declaration did not conform to the writ in the enumeration of the goods specified, or to strike out both counts in the declaration or one of them as embarrassing.

F. Osler shewed cause, citing *Barber v. Armstrong*, 5 P. R. 153; *Deal v. Potter*, 26 U. C. R. 578; *Gibbs v. Cruikshank*, L. R. 8 C. P. 454; *Gilchrist v. Conger*, 11 U. C. R. 197.

Holman, contra.

MR. DALTON.—“Where the action is founded on a wrongful detention, and not on the original taking of the property, the declaration shall conform to the writ, and may be the same as in an action of detinue”: Replevin Act, ch. 53, sec. 24, R. S. O. “Replevin may be brought to recover goods which are still detained by the person who took them, and this is called replevin in the *detinet*, which has been long since obsolete”: 1 Wm. Saund. 635, (ed. 1871.)

But the modern action of replevin is in the *detinuit* which is so called because as the word imports, it is brought when the goods have been delivered to the party, which is done by the sheriff upon a writ of replevin or plaint levied before him: *Bull. N. P.* 52. The plaintiff in replevin in the *detinet* was entitled to recover as well the value of the goods as damages for taking them, but in the present action on the *detinuit* he can only recover damages for the taking.

Upon these authorities, and after the case of *Deal v. Potter*, 26 U. C. R. 578, I cannot see what possible objection there can be to this declaration.

Ward for the defendant, obtained a rule *nisi* to set aside this order, the four days within which a summons by way of appeal could be granted having elapsed before the application was made.

Aylesworth shewed cause.

Ward supported the rule.

HAGARTY, C. J., discharged the rule, but chiefly on the ground that judgment in default of a plea had been signed against the defendant before the rule had been taken out.

McCLEARY v. MORROW.

Old issue—Notice of trial—Term's notice of proceeding.

Where no proceeding has been taken in the cause for a year subsequent to issue being joined, the plaintiff must give a term's notice of his intention to serve notice of trial.

[March 28, 1879. Mr. Dalton.]

Notice of trial had been served in June, 1875, and countermanded. No proceeding had been taken in the cause until March, 1879, when notice of trial was again served.

Armour obtained a summons to set aside this notice as irregular, on the ground that the plaintiff had not given a term's notice of his intention to proceed to trial, as required by the practice, this being an old issue and no proceeding in the cause having been taken within a year.

Langton shewed cause.

Armour, in support of the summons, cited *Deacon v. Fuller*, 1 C. & M. 349 : *Tidd's Practice*, 8th ed., 816.

MR. DALTON.—The plaintiff should have given a term's notice of his intention to proceed. The summons is made absolute. See *Tyre v. Wilkes*, 2 P. R. 265.

McDONALD V. MCKINNON.

Pleading—New assignment.

A defendant has four days only to plead to a new assignment.

[April 4th, 1879.—Mr. Dalton.]

IN an action for trespass the defendant pleaded *son assault demesne*, and the plaintiff filed a new assignment. On the fifth day after service of the new assignment the plaintiff signed judgment against the defendant in default of a plea.

H. J. Scott moved to set aside the judgment for irregularity, on the ground that a defendant has eight days to plead to a new assignment. Under the old practice the defendant had eight days: *Unger v. Crosby*, 3 O. S. 175. With a knowledge of this the Canadian Statute, R. S. O., ch. 50, sec. 101, was made different from the corresponding English Statute. This is a plea, and comes under the first decision of cases, and is not included in the words, "or otherwise," which are not equivalent to the English words, "any subsequent pleading."

Aylesworth shewed cause to the application in the first instance, and pointed out that the case cited was decided under Con. Stat. 22, sec 92, which is repealed by 36 Vic. ch. 9, sec. 5.

MR. DALTON.—The judgment is regular. A defendant has only four days to plead to a new assignment. I will, however, set the judgment aside upon the merits, and allow the defendant in to plead.

ROBERTSON v. McMASTER.

Security for costs—Insolvent plaintiff.

The defendant was aware of the insolvency of the plaintiff before the action was commenced, but did not apply for security for costs until after issue was joined, alleging that he was not before aware that the plaintiff had not obtained his discharge.

Held, that the defendant had waived his right to security.

[April 18, 1879.—Mr. Dalton.]

THIS was an action for illegal arrest.

The plaintiff resided and carried on business at Belleville, until April, 1877, when he sold out his business. A meeting of his creditors was held in the City of Montreal, at which meeting he was present.

The explanations there given by him as to his financial affairs proved unsatisfactory to the defendant and others of his creditors.

Acting on the advice of his counsel the defendant issued a writ of *capias* against the plaintiff and committed him to prison. Writs of *capias* were also issued against the plaintiff by other creditors.

The legality of these proceedings was tested, and upheld on appeal to the Court of Queen's Bench for the Province of Quebec. The plaintiff having been declared an insolvent, he was liberated from arrest under the provisions of the Insolvent Act. He then brought the present action for illegal arrest and imprisonment.

The declaration was served February 27th, 1879, and interlocutory judgment in default of a plea was signed March 15th. The plaintiff's attorney then wrote to the defendant's attorney offering to withdraw the judgment if the pleas were filed at once. These terms were agreed to, and an order was obtained setting aside the judgment and directing the notice of assessment served by the plaintiff's attorney to stand as a notice of trial for the next Belleville Assizes.

Issue was joined March 27th, but the plaintiff was unable to bring the cause down to trial at these Assizes, which commenced April 1st.

Holman, for the plaintiff, obtained a summons on March 29th, calling upon the plaintiff to shew cause why proceedings should not be stayed until the plaintiff should furnish security for costs, on the ground that he was an insolvent who had not obtained his discharge.

Aylesworth showed cause.

Holman, in support of the summons.

MR. DALTON.—I must take it to be law now that the clause of the Insolvent Act requiring an insolvent who has not obtained his discharge to give security for costs, applies to the case where the insolvent is suing for a cause of action which does not pass to his assignees. But there are several objections to the order in this case. First,—Interlocutory judgment had been signed and set aside upon terms. Secondly,—That defendant was under terms to go to trial, which impliedly waived the right to security, as it seems to me. Thirdly,—That issue had been joined when the motion for security was made. To this it is answered that defendant did not know until the 27th of March that the plaintiff had not obtained his discharge.

This seems to me no answer, because defendant well knew at the commencement of the suit that the plaintiff was an insolvent. That is not denied. The status of the plaintiff was known, and if defendant did not know the fact as to the discharge or non-discharge, it was because he did not take the trouble to enquire.

Suppose a customer of the defendant had removed to the United States, and to defendant's knowledge had resided there a year or two, could defendant afterwards, on a motion of this description, allege the excuse that he had not till recently become aware of the fact that the plaintiff had *not returned* to Canada?

It would seem to me in that case that it would be

sufficient to say that he had been aware of the foreign residence.

It also seems to me that in this case it is enough to say that defendant was aware at the commencement of this suit that the plaintiff was an insolvent.

I must discharge the summons.

REGINA v. ST. DENIS.

County Judges' Criminal Court—Power to imprison—Indictment.

The prisoner was convicted before a County Judges' Criminal Court on a charge of receiving stolen goods, knowing them to have been feloniously stolen, and was sentenced to imprisonment. On an application for a *Habeas Corpus*—*Held*, that the Court was a Court of Record, and that under R. S. O., ch. 70, sec. 1, there was therefore no right to the writ.

Held, also, that the Judge had power to imprison.

Held, also, that if an indictment for stealing certain articles, be sustainable as to some of the articles stolen, the conviction is good, although the indictment may contain any number of articles as to which an indictment could not be sustained.

[March 28th, 1875.—Cameron, J.]

GIDEON ST. DENIS was convicted on the 5th of February, 1879, before the County Judge's Criminal Court of the County of Carleton, on a charge of receiving stolen goods, knowing them to have been feloniously stolen, and was sentenced by Judge Ross, constituting said Court, to imprisonment in the common gaol for the County of Carleton.

Ward, for the prisoner, moved on petition for a *habeas corpus* to bring the prisoner before the Court or a Judge thereof, in order to procure his discharge from, as was alleged, an illegal custody and imprisonment, on the grounds: First, that on the evidence the alleged receiving,

if any, took place at Hull, in the Province of Quebec, whereas it was charged in the indictment to have been committed at Ottawa, in the Province of Ontario, where the trial was held. Secondly, the goods stolen were part of and fixed to a mill, and part of the freehold, and not the subject of larceny.

CAMERON, J.—Counsel for the prisoner, in moving, admitted that if the County Judge's Criminal Court is a Court of record, he is precluded from the right to a *habeas corpus* by Revised Statutes of Ontario, ch. 70, which excepts from its operation persons imprisoned by the judgment, conviction or decree of a Court of record.

I think there can be no doubt the Court is a Court of record. By R. S. O., ch. 45, the Judge of every County Court is constituted a Court of record for the trial out of Sessions, and without a jury, of any person committed to gaol on a charge of being guilty of any offence for which such person may be tried at a Court of General Sessions of the Peace, and the Court so constituted shall have the powers and duties which the Act 32 & 33 Vic. ch. 35, purports to give.

In *Regina v. Cornwall*, 33 U. C. R. 106, the Court of Queen's Bench, before the passing of 36 Vic. ch. 8, Ont., now R. S. O. ch. 45, treated it as a Court of record and reviewed its proceedings on a writ of error, assuming the Parliament of the Dominion had power to constitute a Court of criminal jurisdiction, a power which seemingly under the British North America Act, 1867, sec. 91, sub-sec. 27, and sec. 92, sub-sec. 14, belongs exclusively to the Local Legislature. The power rests with one or other of these Legislatures, and as both have declared the County Judge's Criminal Court to be a Court of record, there can now be no room for question on the subject, and being a Court of record its judgment cannot be reviewed on a writ of *habeas corpus*.

It does not appear to me there has, however, been any miscarriage in law. By section 20 of 32 & 33 Vic. ch. 21,

whosoever steals * * any brass or other metal * * fixed in or to *any building whatsoever*, or anything made of metal fixed in any land being private property, is guilty of felony, and by sec. 105 of the same Act whosoever receives any chattel * * knowing the same to have been feloniously stolen, may * * be dealt with, indicted, tried and punished in any county * * in which he has or has had such property in his possession, or in any county in which the party guilty of the principal felony may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished in the county where he actually received such property.

The affidavit of the prisoner sets forth in paragraph 4: "It was proved that the brass belonged to engines which were fixed to the ground, but that some of it had been removed temporarily." The brass removed from the engines fixed to the ground, assuming these to have been part of the freehold—and whether they were so or not would be a question of fact to be determined by the Court—became a chattel, though for some purposes it might be deemed a part of the realty. Before the Act making it felony to steal fixtures or things appurtenant to the realty as part thereof, it was held that if the owner or a stranger sever them, and another man come and steal them, or if they sever them at one time and at another come and take them away, it is larceny: 3 Inst. 109; 1 Hale P. C. 510.

It being conceded then that some of the things were severed before the larceny, as to these the indictment for simple larceny or receiving was sustainable, and the conviction would be perfectly good though the indictment may have contained any number of articles as to which an indictment could not be sustained.

It is further objected the Judge had no power to imprison, as the statute, under the authority of which the Court was held, does not give the Judge the same powers as the General Sessions to punish or imprison, except where the party pleads guilty: sec. 3, sub-sec. 3, 32 & 33 Vic. ch. 35, whereby it is declared on a plea of guilty the

Judge shall pass the sentence of the law on the prisoner, which shall have the same force and effect as if passed at any Court of General Sessions of the Peace. These latter words are omitted from the first and fourth sections of the Act. The first is as follows : "Any person committed to jail for trial on a charge of being guilty of any offence for which he may be tried at a Court of General Sessions of the Peace, may, with his own consent, of which consent an entry shall then be made of record, and subject to the provisions hereinafter made, be tried out of Sessions, and if convicted may be sentenced by the Judge."

By section 100 of 32 & 33 Vic. ch. 21: * * "Every receiver, howsoever convicted, shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years, and not less than two years, or in any gaol or other place of confinement for any term less than two years, with or without hard labour." The County Judge's Criminal Court having jurisdiction to try, and the power to sentence being expressly given to it, the sentence operates under the Act imposing the punishment, and it was quite unnecessary to have added to sub-sec. 3 of sec. 3, 32 & 33 Vic. ch. 35, the provision that the sentence should have the same effect as if passed at any Court of General Sessions of the Peace ; and when sec. 4 declares that the Judge shall, if the prisoner is found guilty, sentence him as in the last preceding section, if necessary, it must be held the Legislature meant with the same effect as such sentence under such preceding section would have. The prisoner is not therefore entitled to the writ of *habeas corpus*.

REGINA v. BOUCHER.

Malicious wounding—Misdemeanor—Form of conviction—Punishment.

On motion to discharge prisoner on *habeas corpus* on conviction before a Police Magistrate, the conviction charged that the prisoner did "unlawfully and maliciously cut and wound one Mary Kelly, with intent then and there to do her grievous bodily harm,"
Held, that, the addition of the words, "with intent to do grievous bodily harm," did not vitiate the conviction, and that the prisoner might be lawfully convicted of the statutory misdemeanour of malicious wounding.
Held, also, that imprisonment at hard labour for a year was properly awarded under 38 Vic., ch. 47.

[April 4th, 1879.—Hagarty, C. J.]

Olivier Boucher was charged before the Police Magistrate of the City of Ottawa, on the 16th January, 1879, "for that the said Olivier Boucher, on 2nd January, 1879, did unlawfully and maliciously cut and wound one Mary Kelly, with intent, then and there, to do her, the said Mary Kelly, grievous bodily harm, contrary to the form of the statute in such cases made and provided." The prisoner consented to be tried summarily before the Police Magistrate, under the provisions of 38 Vic. ch. 47, was found guilty, and was sentenced to imprisonment at hard labour for one year.

Ward, for the prisoner, obtained a writ of *certiorari* to remove the proceedings relating to the conviction into the Court of Queen's Bench. A rule *nisi* was obtained by the same counsel, calling upon the Attorney-General to show cause why the prisoner should not be discharged, on the following grounds:—"1. That the said Police Magistrate had no authority under the statute under which he tried the said prisoner, to commit him for a longer period than six months, whereas he committed him for one year. 2 That supposing the said magistrate treated the said alleged offence as falling within the latter clause of the 19th section of the Act respecting offences against the person, he had no power to sentence him to the Central Prison with hard labour, and as the said conviction is with hard labour, it is void. 3. That the information or indictment upon which the said prisoner was tried is for the alleged offence

of wounding, &c., whereas the conviction is for cutting and wounding. 4. That though the said Olivier Boucher is found guilty of a felony as evidenced by the intent charged, he is not in the said information or indictment charged with doing the alleged act feloniously."

The prisoner was brought before the Court on a *habeas corpus* issued with the rule *nisi*.

J. G. Scott, Q. C., for the Attorney-General, shewed cause to the rule. He contended that the conviction was good. The "cutting" is simply the kind of wounding and the specification of this, though unnecessary, cannot make the conviction bad. If an offence sufficient to maintain the indictment be well laid it is enough, though other matters which would increase the offence are averred: *Russell* on Crimes, vol. ii., p. 392, *Ib.* p. 394, note *x*; *Attorney General of New South Wales v. Macpherson*, L. R. 3 P. C. 268; *Rex v. Jones*, 2 B. & Ad. 611.

Ward, supported the rule.

HAGARTY, C. J.—According to all the authorities an indictment for felony must charge that the act was done "feloniously." *Gray's Case*, Leigh & Cave, 370 (1864) is very clear on this, and it is not sufficient to follow merely the words of the statute. I treat the conviction as a good conviction for unlawfully and maliciously wounding, however inartificially drawn, as for the statutable misdemeanor. The addition of the words, "with intent to do grievous bodily harm," does not, I think, vitiate it. As it is not felony from the omission of the technical word "feloniously," I do not think it bad from the unnecessary addition of the intent. It is not charged as a felonious intent, and the conviction would be good without it. I cannot hold that it makes it bad. See *Attorney-General of New South Wales v. Macpherson*, L. R. 3 P. C. 269. I refer to the Dominion Act, 1875, 38 Vic. ch. 47, sec. 5, which declares that no conviction, &c., shall be questioned for want of form. I think this conviction is clearly for an unlawful and malicious wounding, and that I may treat it

as for a misdemeanour under the statute, clause 19, and that the punishment of twelve months' imprisonment with hard labour is warranted.

If the conviction aptly described a felony, the punishment is well awarded. If it only show a misdemeanour, the punishment is equally right. The Statute of 1869 defines the crime. Jurisdiction is given to Police Magistrates to try certain of these offences, and where the prisoner does not plead guilty, the Magistrate can only sentence to six months' imprisonment. Then the Act of 1875 enlarges the power to give any sentence that could be awarded at the General Sessions, and directs that the Act of 1869 shall be followed.

I see nothing in the objection as to the variance between the informations for cutting and wounding, and the conviction which is only for "wounding."

Prisoner remanded.

IN RE SMITH, AN INFANT.

Infant—Custody of illegitimate child—Religion.

A mother, some months before her death, consigned her illegitimate child, 7 years of age, whose reputed father was dead, to the custody of a Protestant institution, she being a Roman Catholic. Immediately before her death, she signed a paper expressing her desire to have her child delivered up for nurture to a Roman Catholic institution.

Held, that the Court had not power to compel the delivery up of the child, and that the expressed wish of the mother was no ground for interference.

[April 25, 1879—*Hagarty, C. J.*

THIS was an application to compel the institution known as the “Boys Home,” to give up to the applicant, Mary McClenchy, an illegitimate child of her deceased daughter, Ellen McClenchy. The following facts were admitted by the counsel :—

The child in question is illegitimate, and is the son of Ellen McClenchy, who was the daughter of Mary McClenchy, the applicant. The reputed father, now dead, is alleged to have been a Protestant, but this is denied by the applicant. The mother of the child was a Roman Catholic, and its grandmother, the applicant, belongs to the same religion. On September 30, 1878, the child was placed in the Boys’ Home, which is a Protestant institution, by one Mrs. Addison, who represented that its name was John Smith, that its age was six years and ten months, and that it was a Protestant, and belonged to the Church of England. The mother, Ellen McClenchy, was the inmate of a house on Elizabeth Street, Toronto, where she had resided for two or three years before her death. Shortly before the admission of the child to the Boys’ Home the mother was taken ill, and was removed to the General Hospital. She left the child with a Mrs. Conroy, with instructions to have it taken to the Boys’ Home until she should recover. Ellen McClenchy died at the Hospital, the child still remaining at the Home. The mother, prior to her death, in presence of the Rev. A. P. Mullen, the priest who attended her in her last illness, signed a paper, of which the following is a copy :—

"This is to certify that I, Ellen Smith, do wish and desire that my child, now in the Orphan's Home, and named James Smith, be given to the Sisters of the House of Providence, to be kept by them."

(Signed,) ELLEN + SMITH,
 her
 mark.

Witness,

(Signed,) A. P. MULLEN, January 7th, 1879."

Shortly after the death of the mother, application was made at the Boys' Home for the custody of the child on behalf of the managers of the House of Providence. Mrs. Addison, and Mrs. McClenchy, the child's grandmother, also applied for the child, but the managers of the Boys' Home declined to give it to any of the applicants, and it still remained in their charge when the present motion was made. It was admitted that the child was receiving the best of care and attention from the authorities of the Boys' Home. The House of Providence is a Roman Catholic benevolent institution, where children in the circumstances of the present one are well cared for and educated.

O'Sullivan, in support of the application. This is a new point not touched by any reported case, and must be decided on principle. An illegitimate child follows the status and domicile of its mother: *Fraser on Parent and Child*, 119. *Partus sequitur ventrem* is a maxim as well of English as of the Roman law. The mother of an illegitimate child stands in the same position towards her offspring as the father of a legitimate child does, so far as its custody is concerned: *Hurd on Habeas Corpus*, 529. A legitimate child shall be brought up in the religion of its father: *Simpson on Infants*, 120, 124. The only way in which a father can control the future religion of his child is by the appointment of guardians: See *Talbot v. The Earl of Shrewsbury*, 4 Jur. 380. The mother is the natural guardian, being the only certain parent of an illegitimate child: *Tyler on Infancy*, 284. The Court in its discretion can and ought to look at the expressed wishes of the mother in this case, and has undoubtedly power to interfere.

H. O'Brien, contra, contended that the Court could not interfere to take away the child from its present custodians. He cited *Re Holshed*, 5 P. R. 251; *Re Brandon & Beasley*, 7 P. R. 347.

HAGARTY, C. J.—There is no dispute as to the facts, and the case was argued with fairness and candour, and with a total absence of any disposition on either side to impute either misconduct or bad faith to the other.

If the mother were still living she would probably be entitled to have her child back, as being within the age of nurture, and not being otherwise disqualified, and not having abandoned any rights which the law recognizes in such a case.

But it seems to me to be impossible to hold that, assuming her to have certain rights as the mother, in or to a child of tender years, she can legally devolve any right on any other person, either by appointing a guardian or giving any testamentary directions.

Her personal claims would in such a case be respected, but she cannot clothe any other person with them.

It is not even the case of an infant up to the close of its mother's life in her charge, and cared for by her. Here she had months before her death freely and knowingly placed the child in this institution, chartered by 24 Vic., ch. 114, "to provide for destitute, homeless, and vagrant boys, children of drunken or dissolute parents, and to promote and encourage habits of honest industry in these poor outcasts," and possessing certain defined powers to apprentice them to trades or business.

It was urged that the child should be educated in the religious belief of its mother.

The difficulty arises from the want of any authority to warrant our recognizing any person or body as entitled to demand or to interfere with the custody of the child.

Had a Protestant mother, some months before her death, voluntarily placed her illegitimate child with the trustees of the House of Providence, I cannot see how any

testamentary or other directions given by her could entitle any one to obtain possession of the child.

There is no question here involved of any property bequeathed to the child, or any suggestion as to any temporal benefit to it, or any ground as to ill treatment, &c.

It rests on an alleged right to bring up the child in its mother's religious belief.

I cannot see that I have any power or right to interfere.

The cases are collected with care by Mr. Justice Gwynne, *In re Holshed*, 5 Pr. Rep. 251, and by the late C. J. Harrison, *In re Brandon and Beasley*, 7 P. R. 347, and his judgment was last Term reviewed and confirmed by the full Court.

MASTER'S OFFICE.

MCARTHUR AND THE CORPORATION OF THE TOWNSHIP OF
SOUTHWOLD.

Certificate of Court of Appeal—Proceedings thereon—Appeal Act, sec. 44.

Held, that a certificate of the Court of Appeal may be acted on in the Court below, without issuing a rule upon such certificate.

[5th March, 1879.—*Mr. Jackson.*]

H. J. Scott produced a certificate of the Court of Appeal ordering that the rule *nisi* in this suit to quash a By-law, be discharged, with costs, reversing the decision of the Court of Common Pleas, and applied for a rule to issue from the latter Court, in accordance with the certificate.

The Master of the Common Pleas, after consulting several of the Judges held that the certificate of the Court of Appeal can be acted upon directly in the Court below, under sec. 44, ch. 38 R. S. O., without issuing a rule upon such certificate. A rule is therefore unnecessary.

CHANCERY CHAMBERS.

McDERMID v. McDERMID ET AL.

Sale under decree—Purchase money—Payment into Court.

On a sale under a decree, the purchaser, except under special circumstances, will not be compelled to pay his purchase money into Court until he has accepted or approved of the title, or the Master has reported that the vendor can make a good title.

[February 8th.—*The Referee.*]
 [March 17th.—*Blake, V. C.*]

In this case, on a bill filed for partition, a decree was made with the usual reference to the Master in ordinary, who found that a sale would be most beneficial.

The defendants, John and Alexander McDermid, tendered four thousand dollars cash for the property, which tender was accepted by the Master's report, on sale dated the 29th of June, 1878.

This report stood confirmed the September following.

On October 28th, 1878, the purchasers demanded an abstract. No abstract was ever served, and the purchasers on the 23rd of January, 1879, served requisitions and objections to title, reciting that no abstract had been delivered, and that those requisitions were served to save time, and called on the vendors to answer them in fourteen days. The vendors failed to answer them, but within the fourteen days served notices of motion to compel payment of the purchase-money into Court. At the expiration of the fourteen days the purchasers took out a warrant before the Master to consider the requisitions, which was pending when the motion was argued before the Referee.

On the 8th of February, 1879, the Referee made an order on the vendor's motion for payment of the purchase-money into Court in one month, and in default a re-sale, &c.

This order was appealed from, and the appeal came on before Blake, V. C., on the 17th of March, 1879.

Arnoldi, for the purchasers, contended that the order of the learned Referee was improper, as the purchasers had not accepted the title or gone into possession, and no report had been made in favour of the title. The authorities were clear that, pending his acceptance of the title, or unless a report in favour of vendor had been made by the Master, the purchaser could not be compelled to pay his purchase-money into Court: *Rutter v. Marriott*, 10 Beav. 33; *Bulmer v. Alison*, 8 Jur. 440; *Seton on Decrees*, 3rd ed. 1194.

Foster, for the vendors, contended that this was simply a question of the Practice of the Court in these cases, as settled by the case of *Stewart v. Stewart*, 1 Chy. Ch. 243.

Arnoldi in reply. *Re Stewart* must have been decided on the special circumstances of that case, because the rule there laid down is in conflict with all the authorities. The practical effect of such a rule would be, to render it impossible for purchasers to raise money to complete their contract.

BLAKE, V. C.—The point raised in this case was one as to which I thought at this day there could be no doubt. Lord Langdale in *Rutter v. Marriott* says: "I am of opinion that it is not a regular proceeding, to obtain an order for payment of purchase money into Court without acceptance of, or even a reference to the Master as to, the title." In our own Court, in *Crooks v. Street*, 1 Chy. Ch. 95, the practice, which I understand has been since followed, was there laid down distinctly. The Court there says: "It is clearly settled now, although the point appears to have been doubted in Lord Erskine's time, that purchase money will not be ordered into Court, even when the purchaser neglects to attend the motion, unless the title has been

either accepted or approved. * * * Now as the vendor has a right to an enquiry whether he can make out a good title, but has no right to an order for the payment of the purchase money into Court until the title has been either accepted or approved, it would seem to follow that the present motion is, under the circumstances, irregular. * * An order for such purpose, however, cannot be obtained until the purchaser has either accepted the title, or the Master, upon a reference as to title, has reported that a good title can be made. * * Before this motion can be made he must have accepted the title; or it must have been certified that a good title can be made."

There may be special circumstances under which it would be proper to order the payment of the purchase money into Court, although the title may not have been accepted, and such may have been the case in *Re Stewart*; but here they do not exist: the purchaser is proceeding with the investigation of the title, and is, I think, clearly entitled to have this made out before he can be compelled to pay more than his deposit. The order appealed from must be discharged, with costs, and the application before the Referee denied, with costs.

VARS V. GOULD.

Security for costs—Trustee—Assignee in insolvency,

An assignee in insolvency *bona fide* suing in discharge of his duty as such assignee, will not be required to give security for costs on the ground that he is without means, and not beneficially interested in the suit.

[February 24th and 27th, 1879.—*The Referee.*]

THE plaintiff was assignee in insolvency of W. B. Johnston. The bill was filed to set aside a sale of goods by Johnston to the defendant as fraudulent against creditors, and to restrain defendant from selling or disposing of the goods. An interim injunction had been obtained.

This was a motion on the part of the defendant for an order for security for costs, on the ground "that the plaintiff is not beneficially interested in this suit, and is a mere trustee for the creditors of the said W. B. Johnston, which creditors reside out of the jurisdiction of this Court, and on the ground that the plaintiff is himself insolvent, and has no real or personal estate within the jurisdiction of the Court to answer the costs of this suit."

The affidavit of the defendant in support of the application stated that he was informed, and believed, that the plaintiff had no property, real or personal, and beyond the subject matter of this suit there were no assets of the estate; that the only real property the plaintiff possessed was heavily encumbered, and the plaintiff was really without property out of which costs against him could be realized. The defendant's solicitor further stated that he had searched in the registry office of the county where the plaintiff resides, and found that the house, which was generally supposed to be the property of the plaintiff, was really the property of his wife, and that there was a mortgage on it for more than its value.

The defendant's affidavit also stated that the creditors in the insolvency proceedings against Johnston resided in the Province of Quebec.

The plaintiff filed in answer his own affidavit, shewing that as official assignee he had given the security required from him by law, which remained unquestioned : that he had, as assignee, seized and had still in his custody chattels of the insolvent of considerable value : that the insolvent claimed to be entitled to \$5,000 insurance moneys on property belonging to him and which had been destroyed by fire, and that the plaintiff was taking steps to compel payment of such insurance moneys : that the plaintiff was possessed in his own right of property of considerable value; and that a number of creditors of the insolvent lived in Ontario. An affidavit of William Mitchell also shewed that the firm of W. Mitchell & Co., Toronto, were creditors of the insolvent, having an unpaid and unsecured claim against the estate of the insolvent amounting to \$272.27.

Fitzgerald for the motion. The plaintiff is worthless, and is only the nominal plaintiff suing as a mere trustee for persons out of the jurisdiction, for whose benefit alone the suit is brought, and from whom the defendant could not recover costs. Under such circumstances security will be ordered: *Lush's Practice*, 938, 3rd ed.; *Mason v. Jeffrey*, 1 Chy. Chamb. 379, 2 Chy. Chamb. 15; *Pendry v. O'Neil*, 7 P. R. 52.

Langton, contra. The principle upon which security was ordered, in *Mason v. Jeffrey*, was, that the plaintiff was improperly lending his name at the instigation of the person really interested to enable that person to test a right without incurring the risk of costs. The case is quite different where the plaintiff sues in the execution of his duty. He is doing so here and in his own right. He receives the fruits of the judgment, and the creditors may or may not be entitled to receive a share in what is recovered. The plaintiff is not lending his name for the benefit of others, within the meaning of the cases: *Hearsay v. Pechell* 7 Scott, 477; *Little v. Wright*, 16 Grant 576; *Sykes v. Sykes*, L. R. 4 C. P. 645; *Denton v. Ashton*, L. R. 4 Q. B. 590; *Monck v. Northwood*, 2 C. L. J. N. S. 268.

Fitzgerald, in reply. The cases cited are distinguishable in this, that in all of them there was some estate in the hands of the plaintiff.

MR. STEPHENS.—After looking at the cases cited, held that the rule in *Mason v. Jeffrey* did not apply to a trustee *bona fide* suing in the execution of his duty, and he dismissed the application, with costs.

Application dismissed.

CRUSO V. CLOSE.

Costs—Deposit by defendant on sale—G. O. 428, 429, 436.

Where a defendant by bill in a foreclosure suit demanded a sale and paid \$80 into Court as a deposit. Held, that although the costs of the sale would exceed that amount, the defendant could not be ordered to increase it, the amount being fixed by schedule S endorsed on the office copy of the bill under order 436.

[February 25th, 1879.—*The Referee.*]
[March 3rd, 1879.—*Proudfoot, V. C.*]

IN this case one of the defendants by bill, to whom the equity of redemption in the mortgaged lands had been conveyed, and who had been served with an office copy of the bill in a foreclosure suit, endorsed in accordance with schedule S. under order 436, filed a notice requiring a sale instead of a foreclosure, and paid \$80 into Court within the time limited. It was admitted by the defendant that the amount would not cover the costs of the sale, and no steps had been taken by the plaintiffs since the notice was filed.

Eddis, for the plaintiffs, applied for an order for the defendant to increase the amount of the deposit. He urged that the general order 436 requiring the office copy bill to be endorsed with schedule S was for the benefit of the plaintiffs to enable them to obtain decree on *præcipe*. The amount of \$80 is not fixed by the order, but only mentioned in the schedule to save the expense of an application to fix the amount, if both parties were satisfied that the amount was reasonable. The defendant is not entitled to a sale under order 436, but under orders 428 and 429, which require the amount of the deposit to be reasonable. The amount to be reasonable must be sufficient to cover the possible costs of the sale: *Bellamy v. Cockle*, 18 Jur. 465. The amount of \$80 is, therefore, unreasonable, and unless the order is granted the order referred to must be held to be inconsistent. The orders should be construed favourably for the plaintiffs, if possible, as it is the intention of the Court to protect them from any loss occasioned by granting the defendant an indulgence, and not to compel them to carry on a sale at their own expense for the benefit of the defendant. He referred to *London & C. L. & A. Co. v. Pulford*, 15 C. L. J. N. S. 55; and *London & C. L. & A. Co. v. Morrison*, 15 C. L. J. N. S. 57.

Macdonald, contra, contended that the sum of \$80 was fixed by the Court as a reasonable sum in all cases: that the endorsement on the office copy bill with schedule S was for the benefit of the defendant, to inform him what he was entitled to, and to enable him to obtain a sale without employing a solicitor. The Court would be misleading the defendant if he could afterwards be ordered to increase his deposit. The order 436 was made several years after the former order referred to, and must be construed as fixing \$80 as the reasonable sum required by order 429. No order could be made until the amount stated in schedule S are changed.

Eddis in reply. The order 436 could be evaded by plaintiffs endorsing their bill in the common form, and

taking decree *pro con.* in Court, thereby depriving the defendant of any benefit under it. He would then be in no better position than a subsequent encumbrancer and would be compelled to increase his deposit under the cases above referred to.

THE REFEREE considered that this case was different from those where there were subsequent encumbrances, and that general order 429, and schedule S. to order 436, must be read together and therefore he had no power to increase the deposit. He gave leave to the parties to refer the matter to a Judge on Monday.

On reference to him, PROUDFOOT, V. C., said: I do not think there is any inconsistency in the orders as is contended. If there is, the order of the latter date must be held to construe the former order, and to fix the sum of \$80 as the reasonable sum required to be paid by the Count under order 429. I do not think the order asked for can be granted as long as the order 436 requiring an office copy bill to be endorsed with schedule S, is in force, and I must dismiss the application.

SHELLEY V. GORING.

Married woman—Next friend—Practice.

Where a married woman filed a bill in respect of property acquired by her after the passing of 35 Vic. c. 16 (the 2nd day of March, 1872), she is not, though married before that date, required to sue by a next friend. Leave was given to strike out the name of a next friend, where one had been named by mistake, and an order had been obtained requiring security for costs.

[1st March, 1879.—*The Referee.*]

[10th March, 1879.—*Spragge, C.*]

THE plaintiffs, married women, filed a bill, in December, 1877, and sued by a next friend. In February, 1878, the defendant, Goring obtained an order staying proceedings until the present next friend had given security, or until another next friend had been named.

The property in respect of which the bill was filed was acquired by the plaintiffs in 1877. It did not appear when they had been married.

They now applied for an order allowing them to amend their bill, by striking out the name of the next friend as being unnecessary.

Mr. Ewart. The plaintiffs truly conformed to the law as interpreted in *Dingman v. Austin*, 33 U. C. Q. B. 190, in naming a next friend. The Statute of 1872 was in that case held to apply only when the marriage took place after the Act. Under the recent decision in the Court of Appeal of *Furniss v. Mitchell*, the Act applies to all property acquired subsequent to the Act, without reference to the date of the marriage.

The property now in question, therefore, is separate property, and no next friend is necessary. But even if the plaintiffs were bound to interpret the Statute for themselves, it can only be said that they have made a mistake, which is never a ground for compelling security for costs. The cases collected in *Waldron v. Mc Walter*, 6 P. R. 145, shew this.

Mr. *Cassels* contended, that having given the defendant an advantage which he seized by filing the bill with a next friend, they were not now entitled to deprive him of such advantage.

When the bill was filed the law did not require a next friend in a suit brought by married women to recover property acquired after 1872. *Adams v. Loomis*, 22 and 24 Grant, 99 and 242; *Dingman v. Austin*; only decided that where the husband had acquired rights prior to 1872, the statute of that year did not take them away. *Furniss v. Mitchell* laid down no new interpretation as to suing by next friend, but only confirmed *Adams v. Loomis*; even the latter laid down no new interpretation of law. The plaintiffs are not entitled to discharge the order made under the law as it is now interpreted in 1878; *Craig v. Phillips*, L. R. 7, Chy. Div. 249.

SPRAGGE, C.—The plaintiffs, married women, filed their bill by a next friend. It is agreed on both sides that in this suit the naming of a next friend was unnecessary.

The defendants were dissatisfied with the next friend named, and obtained an order on the 27th of February, 1878, that proceedings should be stayed until he should be changed, or give security for costs. This was assuming that one was necessary, but the one named was not sufficient to answer the costs. It seems then to have been assumed on both sides that a next friend was necessary; each was under the same error in that respect.

Afterwards the plaintiffs discovered their error, perhaps from the difficulty of finding another next friend, or reading *Adams v. Loomis* more carefully, or from the recent decision in appeal in *Furniss v. Mitchell*, and they applied on the 4th of March (this present month) for an order for leave to amend, and that the order of February, 1878, should be vacated. This application was refused, and the order refusing it is now appealed from.

The application was to set themselves right, to relieve themselves from a burden and a difficulty that they had

unwittingly imposed upon themselves. The defendants say that they had acquired a right under the original frame of the bill and the order of February, 1878; but it was a right, or rather an advantage, to which the defendants were in no way entitled, and I see no good ground, so far, against allowing the plaintiffs to place themselves upon proper terms in the position to which as suitors they were entitled. The order as it stands prevents their proceeding in their suit until they do that which they were never bound to do. Their having supposed they were bound to do it is no good reason for compelling them to do it, and staying their suit until they do, unless the defendants have been prejudiced by their mistake.

Then what are the other reasons why the plaintiffs should not be allowed to set themselves right? It is said the suit is for a small matter. It is for each plaintiff for one-fifth of the crops of a fifty-acre farm, and one plaintiff has settled with Goring, the real defendant. The bill is filed under the lower scale of fees.

I cannot say that it is so insignificant that this Court should not entertain it. The smallness, and the fact of one plaintiff having settled with Goring, are not sufficient reasons to my mind for refusing to allow the plaintiffs to set themselves right. There has been some delay, but I do not understand that to have been made a ground before the Referee, or to be made a ground now in support of his order.

The case of *Waldron v. McWalter*, 6 P. R. 145, before my brother Blake, proceeded on the ground of fraud; and the cases referred to by him of *Sandys v. Long*, 2 M. & K. 487; *Kerr v. Gillespie*, 7 Beavan 269; *Knight v. Cory*, 9 Jurist N. S. 491; and *Hurst v. Padwick*, 12 Jurist 21, shew that error through inadvertence may be corrected.

In my opinion, the application made on the 4th instant should have been granted on payment of the costs of that application and of the application of February, 1878. The plaintiff is entitled to the costs of this appeal.

The appeal is allowed on those terms.

RE ARNOTT—CHATTERTON v. CHATTERTON.

Partition under General Order 640—Reference—Jurisdiction of Referee.

Under G. O. 640, where special circumstances are shewn on an application for partition or sale of lands, a reference to a Master other than the Master in the county town of the county where the lands are situate will be directed.

The application under the order should be made to a Judge in Chambers.

[March 3rd, 1879.—*Proudfoot, V. C.*]

This was an application under general order 640, for an order for partition or sale of certain lands situate in the county of Durham.

Mr. Roaf, for the plaintiff, asked for an order directing a reference to the Master at Whitby, in the county of Ontario, instead of Cobourg, the county town of the county where the lands lay, on the ground that the land being near Whitby, a reference to the Master there would be much less expensive, and would be more convenient to all parties than a reference to Cobourg.

PROUDFOOT, V. C., granted the application, and held that it was properly made to a Judge in Chambers, and not to the Referee, under general order 640.

Fraudulent conveyance—Sale under decree—Execution.

PORTE V. IRWIN ET UX.

Where a decree directed a sale of certain property at the expiration of a year from the date of a Master's report, a sale at the end of a year from the date of the decree, instead of the date of the report, was allowed under special circumstances, on the ground that the decree was in effect equivalent to a judgment at law.

[18th March, 1879.—*Blake, V.C.*]

A bill had been filed by a simple contract creditor, to declare a conveyance to the defendant, Catharine Irwin, fraudulent as against the plaintiff and other creditors of her husband, the defendant Henry J. Irwin, and a decree had been made directing the Master at London to take the usual accounts, and to fix the time for sale in default of payment at one year after the date of his report, unless it should appear that any such creditor had a *fi. fa.* against the lands of the debtor in the hands of the proper sheriff which he would be entitled to enforce at an earlier date.

Unavoidable delay took place in obtaining the report, by which the Master found that there was no creditor who had a *fi. fa.* lands in the sheriff's hands, and appointed the 29th day of September, 1879, as the day for payment.

In the meantime the defendants had abandoned the property and it was going to waste.

Mr. G. M. Evans for the plaintiff, the other creditors consenting, moved for an order to vary the decree so as to permit of an immediate sale, on the ground that the property was going to waste.

BLAKE, V. C.—Granted the order, as more than a year had elapsed since the granting of the decree, which was in effect equivalent to the defendants obtaining a judgment at law against the defendant Henry J. Irwin.

BUTLER V. STANDARD FIRE INSURANCE COMPANY.

Appeal—Stay of proceedings in Master's office—Practice.

Where a decree had been made declaring the plaintiff entitled to insurance moneys, and directing a reference to ascertain the amount and payment forthwith after the making of the report, an order staying proceedings in the Master's office was refused pending an appeal from the decree.

[March 20th, 1879.—*The Referee.*]

THE plaintiff obtained a decree declaring him entitled to insurance moneys and costs of suit, and directing a reference to the Master at Peterborough to ascertain the amount of loss and to tax costs. The amount which the Master might find due for damages and costs was directed to be paid forthwith after the making of the report.

The Decree had been carried into the Master's office, but no report had been made.

Defendants desired to appeal from the decree, and filed a bond in \$2,700, conditioned to pay what might be found due if the decree was sustained,

Mr. Watson, for the defendants. Security being given for a sum sufficient to cover double the amount which might be found due for damages and costs, moved to stay proceedings pending the appeal, and contended that the statutes authorized the stay, and that the order was in the discretion of the Court.

H. Cassels, contra, contended that the Court will not stay proceedings in the Master's office, that the R. S. O., ch. 38, sec. 27, subsec. 4, only directs execution to be stayed upon satisfactory security being given to cover the amount awarded.

The General Orders of the Court of Appeal shew that satisfactory security is security in double the amount awarded. Until the Master makes his report, no fixed amount is awarded, and therefore proper and satisfactory security cannot be given. The judgment is not a perfected and complete judgment until the Master has made a report,

and cannot until then be enforced ; differing in this respect from a judgment at law, which is complete when judgment is signed. *Gamble v. Howland*, 3 Grant 281 ; *Heward v. Heward*, 2 Chy. Cham. Rep. 245, were referred to.

THE REFEREE dismissed the motion, with costs.

COLLVER V. SWAYZIE.

*Jurisdiction of Referee—Appointing representative ad litem—
R. S. O. c. 49, s. 9.*

A motion made under R. S. O. c. 49, s. 9, to appoint an administrator *ad litem* of the estate of a deceased person, may be made before the Referee, as that section merely extends a jurisdiction already possessed by him under G. O. 56.

[March 25th, 1879.—*The Referee.*]
[March 31st, 1879.—*Spragge, C.*]

This was a suit by a creditor of W. F. Swayzie under a bond, to set aside conveyances by Swayzie as fraudulent as against creditors.

Swayzie had died intestate before the plaintiff had established his claim at law, and no administrator had been appointed.

The defendants were the parties to whom the alleged fraudulent conveyances had been made, but no one was before the Court to represent the deceased Swayzie's estate.

The widow of the intestate was a defendant, and the person principally interested in the lands in question.

Mr. T. Langton now moved under general order 56, and the extension of that order by section 9 of the R. S. O., chapter 49, for an order appointing the widow, Phoebe

Swayzie, or other suitable person to represent the estate of W. F. Swayzie, or allowing the plaintiff to proceed without a representative of the estate, on the ground that there was no other property belonging to the estate of the intestate other than the land in question in the suit, and that the representation of the estate could therefore be but formal.

Mr. *Hoyles*, contra.

THE REFEREE.—I think I have authority to make the order asked for. Such orders in the same terms, and having precisely the same legal effect, were made by the Judge's secretary, and by the Referee, under the general order 56, before the passing of the Act 39 Vic. ch. 7, sec. 23. That Act, in my opinion, creates no new "authority or jurisdiction" within the meaning of general order 560. It is in the same words as old order 56, and merely enacts that the powers conferred by that order may be exercised in certain cases in which, by a series of judicial decisions, the Court in its discretion had determined that it would not exercise the power. I take it that in the construction of a statute the term *Judge* must be held to include *Referee* in cases coming within his limited jurisdiction, and this clause in effect says to the Judge or judicial officer who had theretofore been in the habit of making such orders that he may do so notwithstanding the existence of certain facts that had been held to be a sufficient reason for refusing the order.

But as, if I am wrong in the view I have taken, the proceedings in the Master's office will be nugatory, I think it a proper case to refer to a Judge for decision.

On reference to him

SPRAGGE, C., held that section 9 R. S. O. chapter 49, merely extended a jurisdiction already possessed by the Referee, and therefore that this was a proper case for him to decide.

The motion was dismissed on the ground of the insufficiency of the affidavit.

BURN V. GIFFORD ET AL.

Mortgagee—Ship—Expenses of voyage—Priority.

Where certain persons, including G., advanced money to complete building a yacht at Cobourg, in order to sail for prizes at New York and Philadelphia, and scrip under seal was executed declaring that G. was to hold the yacht in trust as security for the advances; and G. expended certain running expenses in taking the yacht to the race:

Held, that G. was entitled to a first charge on the proceeds of the sale of the yacht, for these expenses being incurred in prosecuting the enterprise for which the trust was created.

[February 28, 1879.—*The Master.*]
[March 24, 1879.—*Proudfoot. V. C.*]

In January, 1876, Alexander Cuthbert, of Cobourg, commenced building a yacht, afterwards called the *Countess of Dufferin*, with a view to competing in the Centennial Regatta at New York in 1876. When the yacht was partially built he applied to the defendant Gifford to obtain funds for the purpose of completing her. Gifford thereafter procured the advance of certain sums of money for the defendant Cuthbert, and the parties lending the money received as security for their advances certain scrip, whereby it was witnessed that, in consideration of the advance, Gifford declared that, to the extent of the advance, he held the yacht in trust for the persons making the advances. The following clause was then added, "It is, however, hereby understood and agreed that, with the exception of said Cuthbert, this section shall not be held to give a preference to said (advancer) over me or other persons, in whose favour I may make similar declarations of trust, the understanding being that all such declarations shall be contemporaneous, and that the persons so assisting Cuthbert shall stand together, and take ratably according to the respective amounts of their several loans as aforesaid. And it is further understood and agreed that I shall have the complete control, direction and management of said yacht, so far as the disposal of her by sale, and so far as her movements are concerned."

The plaintiff did not lend any money on the yacht, but afterwards, about the beginning of June, 1876, the defendants Cuthbert and Gifford applied to him to advance an amount sufficient to pay for the cabin fittings of the vessel and for supplies for the contemplated trip, and he thereupon advanced \$1,600 towards that end, and an agreement, dated 6th June, 1876, between him and the defendants Cuthbert and Gifford, was entered into, which recited that Gifford became the legal owner of the yacht, in trust for all those who would subscribe towards her completion and outfit, that he was to take command of her when completed, to compete with the yachts, to receive all moneys that she might win in races, and sail her when and where he chose for the benefit of those who had subscribed : that Cuthbert's payments and wages amounted to \$1,500 : that the plaintiff had agreed to advance \$1,600 towards the construction, outfit and sailing of the yacht; and that Gifford had advanced \$1,600 towards the expense of the construction, outfit, and sailing of the yacht. It was agreed that Gifford should hold the said yacht and be the owner thereof in trust for the plaintiff, Cuthbert, and himself and the other subscribers, and that Gifford should have the absolute command of the yacht, and full power after her mission was performed to New York and Philadelphia to sell her, and from the moneys to arise from the sale he was in the first place to pay all just debts that might be due and owing in respect of the said yacht, and in the next place to pay the said sum of \$1,600 to the plaintiff, the sum of \$1,500 to Cuthbert, and \$1,600 to himself, and any surplus to Cuthbert.

The yacht, under the management of the defendant Gifford, was subsequently taken to Philadelphia, competed in the race, which, however, it failed to win, and was brought back by him to Cobourg. The expenses incurred by the defendant Gifford during this trip for seamen's wages and sailing expenses amounted to about \$5,000.

The plaintiff subsequently purchased a portion of the scrip before mentioned, and in July, 1878, filed a bill on

behalf of himself and the other scrip-holders, praying a sale of the yacht and payment of the scrip loans as a first charge on the vessel.

A decree was made by consent, directing a reference to the Master in Ordinary, but with leave to change the reference to Cobourg, which was afterwards done; to take the usual accounts, ascertain the incumbrances (if any), and settle their priorities. The Master at Cobourg, by his report, dated the 28th of February, 1879, found that the defendant Gifford had a first charge on the proceeds of the sale of the yacht for all expenses incurred by him in taking the vessel to Philadelphia and back.

The plaintiff appealed from this report, and the appeal came on before Proudfoot, V. C., on Monday, the 24th of March, 1879.

Mr. MacLennan, Q.C., and Mr. Nugent appeared for the plaintiff.

Mr. Boyd, Q.C., for the defendant, Gifford.

Mr. MacLennan contended that Mr. Gifford occupied a double position. He was a trustee for the scrip-holders for the amount advanced by them for completion of the yacht, but he was also an agent or trustee for Cuthbert, the owner of the vessel, and it was in the latter capacity that he incurred expenses in taking the yacht to the race. As far, therefore, as Cuthbert is concerned in the proceeds of sale, there is no doubt that Gifford is entitled to be paid first. But the scrip-holders never agreed to allow their security to be subject to the expenses of the trip, nor does anything on the face of the scrip shew that they did. If it is held that he was sailing the yacht for the scrip-holders, they would have been liable for collision or other mishaps that might have occurred, and it would follow that if Gifford did not get paid in full out of the proceeds of the sale he could make the scrip-holders pay him the difference.

Mr. Boyd argued that Gifford was in the position of master, and as such had the right to claim a lien for expenses of the voyage, in priority to other parties: *Mac-*

lachlan on Shipping, 461. Though the plaintiff is in the position of mortgagee, yet if he allows the owners to navigate the vessel the outlay therein incurred is privileged over the claims of the mortgagee by the provisions of the maritime law, and the Court of Chancery will act by way of analogy to that law in a case of this kind. Putting it on the footing of *trustee* and *cestui que trust*, the Court will not deprive Gifford of the legal estate and ownership without recouping him for his necessary expenditure and wages of seamen, inasmuch as all parties knew and concurred in his management and sailing of the yacht.

PROUDFOOT, V. C.—The plaintiff appeals from the Master's report.

It is quite plain that the scrip-holders and the plaintiff knew the purpose for which the yacht was being constructed—to sail for the Queen's Plate at New York, and to take a part in the races at the Centennial.

The expenses incurred by Gifford are not impeached as improper or extravagant, and I must assume that they were necessary and proper for the use to which the yacht was put.

But it is contended that under the agreement of June, 1876, "the debts due and owing in respect of the said yacht" must mean those incurred in such a way as to become a special lien on the yacht, and that these expenses never did become so. I think it is very probable this is the meaning, and in that case the trust does not cover the expenses. But it is a general rule of equity that, "It follows from the nature of the office, whether expressed in the instrument or not, that the trust property shall reimburse the trustee all the charges and expenses incurred in the execution of the trust:" *Norvall v. Halford*, 8 Ves. 8.

In the present case Gifford is clearly a trustee; it is true he is also a *cestui que trust*, but I do not think that varies or detracts from the duties imposed upon him as trustee, and does not alter the rules applicable to trustees. The expenses incurred in the protection, or maintenance, of the

trust property are to be first paid out of it before there will be any fund to apply upon the trusts themselves. The same rule will guide when the expenses are incurred in the prosecution of the enterprise for which the trust is created, or for effecting the object of the trust: *Hethersell v. Hales*, 2 Ch. Rep. 158.

I think the Master came to a correct conclusion, and I dismiss the appeal, with costs.

COMMON LAW CHAMBERS.

CORCORAN V. ROBB.

Libel—Plea of justification—Particulars.

In an action of libel the plaintiff alleged that the defendant had accused him in a newspaper article of having made false returns to the Government in his business of distiller. To this the defendant pleaded justification.

Held, that the plaintiff was entitled to particulars of the defence intended to be set up under this plea.

[April 19, 1879.—Mr Dalton, Q. C.]

This was an action of libel. The plaintiff alleged in the declaration, that the defendant falsely and maliciously printed and published of the plaintiff, in a newspaper called the *Stratford Weekly Herald*, the words following: “He does not pretend that they punished him for doing right; we contend that they mulcted him for doing wrong, and we are asked to pay him one dollar—one hundred cents—as the price of his character, because we said that he acquired wealth by cheating the Government, whereas we should have said that he lost money. We accept his explanation, and in future we shall be careful to give his own statement of the transaction. But it is all the same to the guardians of the depleted public purse, who refused to believe the sworn returns of the distillery, seized his property, and punished him just as impartially as though there had been millions in it.” The meaning alleged was, that the plaintiff had sworn to false returns: had perjured himself by swearing to such false returns in carrying on the business of a distiller, and by means of such perjury

and false swearing had defrauded the Government and deprived them of the revenue properly due them, and that the Government properly seized his distillery and punished him for such fraud and false swearing.

Several other libellous passages, to much the same effect, were also alleged to have been published of the plaintiff by the defendant in the same newspaper. The defendant pleaded "not guilty;" and for a second plea, that without the meaning alleged the words complained of were true in substance and in fact.

Aylesworth, for the plaintiff, obtained a summons calling upon the defendant to deliver full particulars in writing, with dates, of the several matters intended to be relied on by him in support of his second plea, or that in default the plea be struck out as embarrassing.

Ogden, for defendant, shewed cause, and contended that this was not a plea under which particulars could be demanded.

MR. DALTON, after reserving judgment, held that the plaintiff was entitled to particulars of the defence to be set up under the plea in question, and made the summons absolute.

PHILIPS V. FOX.

Assignee of judgment—Suggestion—35 Vic. ch. 12.

Held, that since the passing of 35 Vic., ch. 12, sec. 1, O., R. S. O. ch. 116, the assignee of a judgment is entitled to revive the same in his own name by entering a suggestion on the roll.

[April 25th, 1879.—Mr. Dalton, Q. C.]

The plaintiff had recovered judgment in 1869 for damages and costs, and subsequently made an assignment of the judgment to a third party under R. S. O. ch. 116, sec. 7.

Aylesworth, for the assignee, now applied under R. S. O. ch. 50, sec. 323, for leave to enter a suggestion on the roll reviving the judgment in the assignee's own name.

MR. DALTON granted the summons, holding that although before the passing of the first mentioned Act, 35 Vic. ch. 12, O., the assignee might not have been entitled to this relief as having only an equitable interest in the judgment, the assignment would under this Act operate as an absolute transfer of all rights and interests in the judgment.

The summons was made absolute on the return, no cause being shown.

STEPHENS V. LAPLANTE.

Prohibition—Division Court—Jurisdiction.

On an application for prohibition to a Division Court, after judgment and execution, where the question of jurisdiction depends upon disputed facts—as, in this case, upon whether the person by whom the bargain sued upon was made, acted as plaintiff's or defendant's agent; if the Division Court Judge has decided this question on evidence, and found in favour of his jurisdiction, the Court will not interfere with his finding; but here, there having been no such decision, and the want of jurisdiction being clear upon the affidavits filed, a prohibition was granted.

[April, 1879.—*Hagarty, C. J.*]

In November, 1878, the plaintiff, as assignee of the estate of McMichael & Hughson, sued the defendant in the Fourth Division Court of the County of Kent for the price of certain goods. Defendant filed a dispute note, and in the note took objection to the jurisdiction of the Division Court in which the case was entered, claiming that the whole cause of action arose within the jurisdiction of the First Division Court of the County of Peterborough.

Judgment was given in favour of the plaintiff, and an execution was issued against the defendant for the amount of the claim.

Shepley, for defendant, obtained a summons for a prohibition to the Fourth Division Court of Kent, on the ground of want of jurisdiction.

Aylesworth shewed cause.

The plaintiff's affidavits stated that the contract for the sale in question had been made by McMichael & Hughson, in Kent, with one Finlay, who at the time represented himself to be the agent of the defendant. The defendant stated that Finlay had sold the goods to him in Peterborough, representing himself to be the agent of McMichael & Hughson. Counsel for the plaintiff urged that, at the trial, before the Judge could give a verdict for the plaintiff he must have been satisfied that Finlay was defendant's agent, and that his finding was not open to review.

HAGARTY, C. J.—On the facts appearing in the affidavits filed, I think it clear that the Division Court had not jurisdiction, as the whole cause of action did not arise within the division : *Noxon v. Holmes*, 24 C. P. 541.

If Finlay were defendant's agent, and made as such a bargain with plaintiff in Kent, to ship goods at a station in Kent, it might be argued that the cause of action wholly arose there.

But if Finlay were plaintiff's agent, selling those goods to defendant in Peterborough, it would be impossible to support the jurisdiction. Then the jurisdiction depends on what is the truth.

If the learned Judge below had decided on evidence that Finlay was defendant's agent, I would not enter into any review or criticism of his decision on the merits ; or if any proof by Finlay or other witness of his being such agent were given, I would not interfere.

As I understand the report, which the learned Judge has kindly furnished at my request, at the trial one of the parties swore that the goods were supplied to defendant on the order of Finlay, his agent, to be delivered on the cars there. This proves merely that the goods were ordered by a person professing to be defendant's agent. The Clerk of the Court produced a letter purporting to be from defendant, objecting to the jurisdiction.

Then we have the very clear statement of the defendant wholly denying the agency, and that he had no dealing with McMichael & Hughson except this one, when Finlay came to him in Peterborough, as plaintiff's agent, and got an order for the goods. Then Finlay swears positively that he was the agent of McMichael & Hughson in the sale, and never acted as defendant's agent ; and that he got the order from defendant at Peterborough as said firm's travelling agent ; and that they, or their assignee, have paid him his commission therefor. I do not think the affidavits filed by the plaintiff displace the strong case made for defendant.

I consider that the learned Judge has found nothing on the disputed question in the way of determining it.

As I think the facts clear, I am reluctantly compelled to allow the writ of prohibition.

MCLAREN v. McCUAIG.

Similiter—Jury notice—Notice of trial—Chancery sittings.

With his joinder of issue, the plaintiff served notice of trial for the Chancery sitting¹. Defendant afterwards served a *similiter* and jury notice. Held, that the *similiter* and jury notice were good, and that the notice of trial must be set aside.

[May 3rd, 1879.—Mr. Dalton, Q. C.]

The plaintiff joined issue on the defendant's pleas, and with the joinder served notice of trial for the Chancery Sittings at Ottawa. The defendant, on the following day, served a *similiter* and a jury notice with it.

Alan Cassels, for the plaintiff, obtained a summons to set aside the *similiter* and jury notice, on the ground that the latter would prevent the plaintiff from going down to trial at the Chancery Sittings, and that defendant's conduct was irregular, after the plaintiff's notice of trial.

Aylesworth shewed cause, contending that under *Quebec Bank v. Gray*, 5 P. R., 31, the plaintiff could serve a *similiter* at any time.

MR. DALTON discharged the summons, and set aside the notice of trial.

REGINA V. CAMPBELL.

Liquor license—Married woman.

A married woman was lessee of certain premises in which her husband sold liquor without a license, contrary to the provisions of R. S. O. ch. 181. Held, that she was liable to be fined under sec. 83 of the Act, although the sale of the liquor took place in her absence.

[May 6th, 1879.—*Hagarty, C. J.*]

One Campbell was charged before the Police Magistrate of the city of Toronto with having sold liquor without a license, and contrary to the provisions of the Liquor License Act, R. S. O. ch. 181.

From the evidence it appeared that Mrs. Campbell, the wife of the accused, was the lessee of the premises, but that the liquor was sold by her husband and while she was not present. The Police Magistrate convicted her of the offence, and fined her \$20.

Blackstock, for Mrs. Campbell, moved for a *certiorari* in order to quash the conviction as being illegal.

Fenton, for the Crown, shewed cause in the first instance without the necessity of issuing a rule *nisi*.

HAGARTY, C. J., held that the conviction was good ; that Mrs. Campbell, as lessee, must be presumed to be cognizant of her husband's conduct in selling the liquor upon the premises, and that she was therefore punishable for the offence under sec. 83 of the Act.

RE CRERAR AND MUIR.*

Power of sale—Subsequent encumbrances—Taxation of costs.

Where a first mortgagee sells under the power of sale contained in his mortgage, a subsequent mortgagee is entitled to an order to tax the first mortgagee's costs of exercising the power of sale such costs to be taxed as between solicitor and client.

[May 7, 1879.—Mr. Dalton, Q. C.]

The Hamilton Provident and Loan Society were first mortgagees of certain lands in the township of Oneida. Their mortgage having fallen into arrear, they sold the property for more than enough to satisfy their claim and costs. Their solicitors, after retaining the amount of the mortgage money, interest, and costs, handed over the balance to the second mortgagee. This balance was not sufficient to pay the second mortgage in full.

Holman, for the second mortgagee, obtained a summons under R. S. O., ch. 140, sec. 43, to tax the first mortgagee's bill of costs.

Aylesworth shewed cause, and contended that the second mortgagee was not entitled to the order under the section mentioned, the taxation of the bill in question being a matter between the company and its solicitors alone, and that the bill having been paid, no third party had a right to intervene. *Re Massey*, 34 Beav. 463; *Re Taylor*, 18 Beav. 165. If the order be granted, it must be for taxation as between solicitor and client.

Holman, in reply, contended that the second mortgagee, whose mortgage could not be satisfied out of the balance, was a party sufficiently interested in the proceeds to be entitled to the order, and that he had a right to stand in the place of the owner of the equity of redemption, who had an undoubted right to have the bill taxed. He cited *Re Jessop*, 32 Beav. 406; *Re O'Donohoe*, 4 P. R. 266; *Re*

* See, *infra*, *Re Macdonald, Macdonald, and Marsh*, page 88.

Wells, 8 Beav. 416; *Re Glass*, 3 P. R. 138; *Morgan & Davy on Costs*, 331.

MR. DALTON held that the second mortgagee was sufficiently interested to come within the above section of the Act, and made the order for taxation of the bill as between solicitor and client.

MASURET V. LANSDELL.

Interpleader—County Court writs—Costs.

Several executions from different County Courts having been placed in the sheriff's hands—

Held, on an interpleader application to the Superior Court, that all costs, including those of the sheriff, should be taxed on the County Court scale

[May 23, 1879.—Mr. Dalton, Q.C.]

This was an interpleader application for the sheriff of Norfolk. Several writs of *fit. fa.* from different County Courts had been placed in the sheriff's hands, and the present application was made in the Superior Court, under R. S. O. ch. 54, sec. 12. Issues having been directed, *Smellie*, for the sheriff, asked for Superior Court costs.

Aylesworth, for the execution creditors, and

Hickey, (D. B. Read,) for the claimant, contended that all costs in the matter should be taxed on the County Court scale, although the application was made in the Superior Court, as all the writs had been issued out of County Courts.

MR. DALTON, held that the sheriff was entitled to County Court costs only; and that the costs of the issues directed should be taxed on the same scale.

IN RE MARTHA JANE SCOTT.

Infant—Custody of—Verbal agreement.

The mother of a child six years of age, whose father was dead, having re-married, delivered up the child to a cousin for nurture and adoption. No written agreement was made, and the parties differed as to the verbal understanding.

Held, that the Court, looking only to the best interests of the child, should refuse to direct its redelivery to the mother. The fact of the mother having re-married, and having children by both husbands, and that the child would be under the custody of a stepfather, was regarded as one ground for the non-interference of the Court.

[June 10th, 1879.—*Osler, J.*]

This was an application by one Emma McLean for a writ of *habeas corpus*, to obtain possession of her child. Previously to her marriage with her present husband, Richard McLean, the applicant had been married to one Joseph Scott, who died in June, 1873. In July of the same year she gave birth to Martha Jane Scott, the child in question. In March, 1876, the applicant was married to her present husband. In the year after this marriage a cousin of Mrs. McLean, a Mrs. Hogg, having no children of her own, expressed her desire to obtain the child, to bring up and educate as an adopted daughter. This was agreed to by the mother, and the child was given over to the custody of Mrs. Hogg. In November, 1878, Mrs. McLean and her husband went to Mrs. Hogg and asked to have the child delivered up to them. This Mrs. Hogg refused to do; and the present application was then made. Mrs. McLean, in her affidavit, stated that the understanding with Mrs. Hogg was, that the latter should take the child to live with her for a month, six months, or a year. Mrs. Hogg, on the other hand, stated that she had received the child absolutely for adoption. It was proved that the present custodians of the child were nurturing her with care and affection, and that a strong attachment existed between them. The applicant and her husband were poor, and had a family growing up, issue of the second marriage.

Wilson (Morrison, Wells, and Gordon) appeared for the applicant.

J. G. Robinson shewed cause.

OSLER, J.—Upon the affidavits I do not feel called upon to interfere with the present custody of the child. So far as I can judge, it would be manifestly against her interest that I should do so.

She was placed in Mrs. Hogg's custody by her mother, the present applicant, two years ago. The parties differ as to the precise terms of the agreement then made, but I am inclined to give credit to Mrs. Hogg's statement. It was her object, having no children of her own, to obtain a child to rear and bring up, and it was therefore very unlikely that she would take this child on such terms as the mother now says were agreed to. The mother is now married again, and has a family by both husbands, and this child would be not in her custody alone, but under that of her stepfather. I do not know that there is any positive rule of law that requires me to interfere, and acting in what I feel to be the best interests of the infant, I refuse the application.

LOCK v. TODD.

Notice to reply—Order for time to reply—Waiver.

The obtaining of an order for time to reply waives an objection that no notice to reply was served, and takes the place of such notice.

[June 13, 1879.—Mr. Dalton, Q. C.]

The time for pleading in this action having expired, the Toronto agents of the defendant's attorney obtained a summons for further time to plead, and on the return of the summons, it appearing that the pleas had in the meantime been filed, an order was made that the defendant be at liberty to amend some clerical errors in them. A copy of the order, with the amended pleas attached, was served upon the Toronto agents of the plaintiff's attorney on April 18, without any notice to reply. The defendant's attorney stated on affidavit that he had sent to the plaintiff's attorney by post, on April 16, a copy of the pleas, with the usual notice to reply. This the latter denied having received. On April 26 the agents of the plaintiff's attorney obtained an *ex parte* order for two weeks' further time to reply; and on the expiry of this time the defendant's attorney signed judgment of *non pros*.

Aylesworth obtained a summons to set aside this judgment, with costs, on the ground of irregularity, in that no notice to reply was served with the pleas, or that the judgment be set aside upon the merits.

Holman shewed cause, and contended that the obtaining of an order for further time to reply, was a waiver of the objection: *Pearson v. Reynolds*, 4 East 571; *Nias v. Spratley*, 4 B. & C. 386.

MR. DALTON held that the plaintiff's having obtained an order for further time to reply, not only waived the irregularity complained of, but operated as a notice to reply. The judgment was, however, set aside upon the merits.

DAVIDSON V. CAMERON.

Foreign judgment—Liquidated amount—Costs.

The plaintiff sued the defendant on a foreign judgment for \$240, and specially endorsed this amount upon the writ of summons. He obtained judgment in default of appearance.

Held, that the foreign judgment was not a liquidated or ascertained amount within the meaning of R. S. O. ch. 50, sec. 153, and that the plaintiff was entitled to Superior Court costs.

[June 20, 1879.—Mr. Dalton, Q.C.]

The plaintiff had sued the defendant in the Province of Quebec, and had recovered judgment for \$240. The present action was brought upon this judgment, and the defendant did not appear to the writ which was specially endorsed. On entering judgment for the plaintiff, the deputy clerk at Cornwall refused to tax Superior Court costs under R. S. O. ch. 50, sec. 153, on the ground that the amount in question was liquidated or ascertained.

Foy, for the plaintiff, moved for an order directing the deputy clerk to tax Superior Court costs.

MR. DALTON held that the judgment sued upon, was not a liquidated or ascertained amount within the meaning of the section mentioned, and made the order as asked.

FLAKE v. CLAPP.

Juror—Withdrawal of—Determination of cause.

The withdrawal of a juror at the trial has the effect of concluding the suit, and with it, of determining the whole cause of action.

[June 20, 1879.—Mr. Dalton, Q.C.]

This action was brought against a magistrate for wrongfully causing the plaintiff to be arrested and detained in custody.

The defendant resided and acted in his official capacity in the county of Lennox and Addington.

Due notice of the action had been served on the defendant on October 30, 1878. The writ of summons in this action was issued from the office of the deputy clerk of the Crown and Pleas for the county of Lennox and Addington, on the 14th day of December following.

The plaintiff's attorney afterwards being under the impression that, as part of the cause of action, namely, the arrest of the plaintiff, arose in the county of Prince Edward, the venue might be laid in the latter county. Accordingly, on the 17th day of the same month of December another writ of summons for the same cause of action was issued out of the office of the deputy clerk for the county of Prince Edward. This latter summons was served, the defendant being ignorant of the issue of the first summons.

The cause was brought on for trial, at Picton, on May 7, 1879.

After the jury had been called, counsel for the defendant proposed to withdraw a juror and so conclude the case. Counsel for the plaintiff believing the venue to have been improperly laid in Prince Edward, and that the action might be continued under the writ of summons issued in Lennox and Addington, agreed to this proposal, and a juror was withdrawn.

Upon the same day the summons dated December 14, was served upon the defendant. Particulars of the plaintiff's demand under this latter summons were furnished showing it to be for the same cause of action as that already determined.

Alan Cassels obtained a summons to set aside the writ of summons of December 14, and all proceedings had thereunder on the ground that the action had already been determined by a suit in Court.

Ogden showed cause on the return of the summons, and produced an affidavit of the plaintiffs' attorney stating that it had not been the intention of the plaintiff or his counsel to determine the cause of action by the withdrawal of a juror, but merely to put an end to the suit brought in Prince Edward, that the other might proceed.

MR. DALTON held that the withdrawal of a juror had the effect of putting an end to the suit, and of determining the whole cause of action upon which the same was brought. The suit commenced by the first writ could not therefore proceed.

Summons made absolute.

RE CORNWALL ELECTION PETITION.

Election petition—Commission to examine a witness.

Held, that in proceedings under a petition filed in accordance with the provisions of the Dominion Controverted Elections' Act, 1874, a commission may be issued to examine a witness who resides in a foreign country.

[August 26, 1879.—Armour, J.]

The petition in this matter was filed under the Dominion Controverted Elections' Act, 1874.

Aylesworth, for the petitioner, moved absolute a summons for a commission to the State of Michigan to examine one Masterson as a witness. The question of the jurisdiction of the Court to make the order asked was the only one that arose in the application. He cited in support of the motion Dom. Stat. 37 Vic. ch. 10, sec. 3, sub-sec. 7, and sec. 45; Imp. Act, 31 & 32 Vic. ch. 125, secs. 2 and 26; *The Wallingford Case*, 1 O'M. & H. 57; *The Staleybridge Case*, 19 L. T. N. S. 703.

Nelson (Foy, Tupper & Macdonell,) shewed cause.

ARMOUR, J., upon the authority of the above cases, made the summons absolute.

TRUST AND LOAN COMPANY V. JONES.

Ejectment—Service—Signing judgment.

The writ of summons in ejectment was served upon the defendant's wife after he had left the country. An order to sign judgment against the husband was granted in default of appearance.

[August 27, 1879.—Mr. Dalton, Q.C.]

This was an action of ejectment. The sheriff's officer served the writ upon the defendant's wife, who was residing in the house upon the premises. It afterwards appeared that the defendant, prior to the issue of the writ, had absconded from the country and was resident in the United States. No appearance was entered to the writ.

Weller, (Macdonald, Macdonald & Marsh,) applied under *Reg. Gen.* 92 for an order to proceed against the defendant and to sign judgment as if the service had been personal. In support of the application he cited *Doe v. Roe*, 1 D. & R. 514.

MR. DALTON made the order as asked, following the above case.

TAYLOR V. ADAM.

Pleading—Trover—Uncertainty.

The plaintiff alleged in one count in trover that the defendant converted to his own use or wrongfully deprived the plaintiff, &c.
Held, overruling *Bain v. MacKay*, 5 P. R. 471, that the count is not embarrassing.

[September 2nd, 1879.—*Mr. Dalton, Q.C.*]

One count of the declaration in trover alleged that the defendant converted to his own use or wrongfully deprived the plaintiff, &c., of the goods and chattels in question.

J. A. Paterson obtained a summons to strike out this count as being embarrassing, and bad on the ground of uncertainty. The application was made on the authority of *Bain v. McKay*, 5 P. R. 471.

Ritchie shewed cause, and contended that the case of *Bain v. McKay* should not be followed. The count could not be said to be embarrassing, since it would be competent for the plaintiff to put in two counts, one alleging that the defendant wrongfully converted, and the other that the defendant wrongfully deprived the plaintiff, &c., of the use and possession of the goods. To frame one count covering both, as in this case, was no more embarrassing than two such counts would be, since the plea of *not guilty* in either case would put the allegations in issue. The method adopted here has the advantage of preventing prolixity.

MR. DALTON.—The objection to the count would formerly have been a good ground for a special demurrer, and it was for this reason that the case of *Bain v. McKay* was so decided. The count, however, is not strictly embarrassing on account of its form, as it might be divided into two counts, as suggested, and the plea of *not guilty* could then be pleaded to both. I would not now follow the case cited.

Summons discharged.

AGNEW V. ROSS.

Insolvency—Costs—Attorney.

The plaintiff, an attorney, was the official assignee of an insolvent estate. He brought an action on behalf of the estate and used his own name as the attorney on the record. The plaintiff obtained a verdict. *Held*, that under section 32 of the Insolvency Act of 1875 he was entitled to tax disbursements only against the defendant.

[September 9, 1879.—*Osler, J.*]

The plaintiff was assignee of the estate of A. B., an insolvent, under the Insolvent Act of 1875. He was also an attorney and solicitor. The present action was brought for a debt due to him as assignee, and the proceedings were taken by "James Agnew, assignee of the estate of A. B., an insolvent, by James Agnew his attorney."

The plaintiff obtained a verdict, and proceeded to enter judgment. The defendant objected that he was not entitled to tax against him more than his disbursements or costs, the plaintiff and his attorney being the same person. The Master having taxed full costs, a summons was obtained to revise the taxation.

Delamere, supported the summons.

Sinclair, (Mowat, MacLennan, and Downey,) showed cause.

OSLER, J.—The defendant relied upon the 32nd section of the Insolvent Act of 1875, the latter part of which enacts that no assignee shall employ any person being his partner as counsel, advocate, attorney, solicitor, or agent for such assignee in respect of the insolvent estate.

I suppose the object of this section to have been to discourage the promotion of litigation which might be injurious to the estate, by removing from the solicitor-assignee the temptation of embarking in it, with the view of making a profit for himself.

In an action prosecuted in contravention of the very terms of the section, an unsuccessful defendant could, in my opinion, resist the allowance of profit-costs on this ground, and I think the present plaintiff is plainly within the equity of the section. No doubt he has a right to sue, but if he does so he must obtain the assent of the creditors or inspectors to employ an attorney, (sec. 43) or else sue in person ; and in the latter case he must sue as an ordinary litigant, and cannot, in my opinion, claim the usual privilege of an attorney, who sues in person for a cause of action accruing to himself personally. The same reason for the prohibition against employing his partner as his attorney, applies with equal force against his acting in that capacity himself.

It was urged that the rule in equity should be adopted, which allows to a trustee who acts as his own solicitor or employs his partner as such, costs against the adverse party, though not as between himself and his *cestui que trust*: *Meighen v. Buell*, 25 Gr. 604, was cited. That indulgence, however, has not been extended without reluctance, and an expression of doubt as to its wisdom, and I do not think I ought to extend the rule to a case of this kind where there is a statutory prohibition against the trustee acting as solicitor.

The summons is, therefore, made absolute to revise the taxation, with a direction that the plaintiff should be taxed his disbursements only.

DOYLE V. THE OWEN SOUND PRINTING COMPANY.

Pleading—Libel—Apology—Payment into Court.

In an action for libel the plea of *not guilty* was held inconsistent with a plea of apology and payment into Court and was ordered to be struck out.

[September 11, 1879.—Mr. Dalton, Q.C.]

In an action for libel the defendants pleaded *not guilty*, and a further plea, under the provisions of R. S. O. ch. 56, sec. 4, that they had inserted in the newspaper in which the alleged libel appeared a full apology therefor and on filing such plea they paid into Court one dollar by way of amends for the injury sustained by the plaintiff.

The plaintiff obtained a summons to strike out the plea of *not guilty* as being inconsistent with the plea of payment into Court.

Ferguson, Q. C., shewed cause.

Ogden, supported the summons, and contended that the plea of payment into Court admitted the plaintiff's right of action, and that the plea of *not guilty* could not therefore be allowed to stand along with it. He referred to *O'Brien v. Clement*, 15 M. & W. 435; *Thompson v. Jackson*, 8 Dowl. 591.

MR. DALTON.—Payment into Court in an action on contract, is an act done in the face of the Court which admits the plaintiff's right of action, and the defendant while doing this act cannot say to the plaintiff: “I never owed you anything.” And so here, the plea of “*not guilty*” is inconsistent with apology and the tender of amends.

Summons made absolute.

SEN V. HEWITT.

Examination of defendant—Time—Notice—Service—Reg. Gen. 135.

Held, that service on the defendant's attorney at his house at 9.30 p.m. on Saturday of an order and appointment to examine the defendant at 2 p.m. on the following Tuesday, was irregular, the notice not being sufficient.

Held. that Rule of Court 135, applies to the service of orders and appointments to examine, and that this service must be treated as if made on the following Monday.

[Easter Term, 1879.—Queen's Bench.]

In this case issue was joined on April 15, 1879, the defendant being under terms to go to trial at the Spring Assizes at Hamilton, commencing April 14, 1879. The plaintiff having entered the record at these Assizes, he took out in Chambers an order to examine the defendant before trial under R. S. O. ch. 50, sec. 156. On the order was endorsed an appointment by the special examiner returnable before him at Brantford, on Tuesday, April 22, at 2 p.m. The order and appointment were served on the defendant and on his attorney at Brantford on the evening of Saturday, April 19, at 9.30 p.m. The defendant went to Hamilton on the Monday following, and retained counsel for the defence. On the same day it was arranged between counsel for both parties that the examination of the defendant should take place at Hamilton instead of Brantford, in consequence of which no person appeared for the plaintiff on the appointment at Brantford. When defendant's counsel at Hamilton made the arrangement to change the place of examination, he was not aware of any irregularity in the service of the order and appointment, and had no express authority from the defendant's attorney to make the arrangement.

On Tuesday, April 22, the defendant's attorney went to Hamilton and refused to allow his client to be examined unless the plaintiff would also submit to examination. This the plaintiff refused to do, insisting that the arrange-

ment made by counsel was binding. On the following day, April 23, the case was called on for trial before Patterson, J. Counsel for the plaintiff moved for an order to strike out the defence under 41 Vic. ch. 8, sec. 9, on the ground of the defendant's non-compliance with the order to examine. The learned Judge, holding that the defendant was in default, offered him the option of an order to strike out his defence, or to put off the trial until the next Assizes, the defendant to pay the costs of the day, and to attend and be examined at his own expense. Defendant preferring the latter alternative, an order was made accordingly.

Dr. Spencer, for defendant, in the following term, obtained a rule *nisi*, from the full Court, calling on the plaintiff to shew cause why the order of Patterson, J., should not be set aside on the grounds: 1. That there was no proper or sufficient service of the order and appointment to examine the defendant at Brantford: as the service was made after 3 p.m. on Saturday it only counted as a service on Monday following, and this did not allow the 48 hours' notice required by the statute, Rule No. 135 of the Rules of Trinity Term, 1856, applying to the service of orders to examine: 2. That the record being entered for trial at Hamilton, it was improper to proceed on an order to examine the defendant at Brantford, pending the trial: 3. That an order striking out the defence under 41 Vic. ch. 8, sec. 9, can only be made as a punishment for contempt, and would be justifiable only under the same circumstances which would justify an attachment, and that, there was no contempt and no case for attachment: 4. The Counsel had no authority to enter into the arrangement to examine the defendant at Hamilton, and if made, it was not binding on the defendant's attorney who alone is responsible for the conduct of his client's case out of Court.

In the same term, *Osler*, Q.C., shewed cause, and Dr. *Spencer*, supported the rule.

At the close of the argument judgment was given.

THE COURT held that Rule of Practice No. 135, applies to the present case, and that service after 3 p.m. on Saturday must be treated as service on Monday: that the service of the order and appointment in this case was therefore irregular, and the defendant was not bound to attend upon it. The Court also intimated their opinion that counsel had no power or authority to bind the client by the arrangement for his examination at Hamilton.

The order made by Patterson, J., was, therefore, set aside.

Rule absolute.

CHANCERY CHAMBERS.

BUILDING AND LOAN ASSOCIATION v. CARSWELL.

Married woman—Dower in equity of Redemption—O. S. 42, ch. 22—Parties.

[April 2nd, 1879.—*Spragge, C.*]

Where the wife of a mortgagor is a party to and bars her dower by the mortgage, she is not improperly made a party defendant to a bill for foreclosure under the mortgage since the coming into force of the above statute on the 11th March, 1879.

HYNES v. SMITH.*

Mechanics' lien—Mortgagees—Registration—Priority.

Work was commenced by contractors in December, 1877: two mortgages were registered against the property on the 1st and 8th June, 1878, respectively. The contractors registered their lien on the 18th June, 1878, and on August 28th, 1878, filed their bill.

Held by the Master in ordinary, that the mortgagees were prior, not subsequent, encumbrancers.

On appeal, SPRAGGE, C., upheld the Master's ruling.

[*The Master.*]
[April 7th, 1879.—*Spragge, C.*]

About the month of December, 1877, William Hynes and Patrick Hynes contracted with James Beaty to do, and commenced, certain work on some houses in the city of Toronto.

* In Appeal.

Beaty subsequently executed certain mortgages of the property, which were registered on the 1st of June and 8th of June, 1878, respectively.

On the 18th June, 1878, the Hynes brothers registered a lien against the property, and on the 28th August, 1878, filed their bill.

A decree was made on the 20th November, 1878, directing a reference to the Master to take an account, ascertain the incumbrancers other than prior mortgagees, and settle their priorities, &c.

The defendant Smith, is the assignee in insolvency of James Beaty.

On the reference the Master in ordinary refused to make the holders of the above mentioned mortgages parties in his office, on the ground that they were prior incumbrancers.

Mr. *Foy*, for the plaintiffs, appealed *ex parte* from this certificate, and the appeal came on for hearing, April 7th.

Mr. *Foy*. In *Walker v. Walton*, 24 Grant 209, Blake, V. C., decided that the Mechanics' Lien Act of 1874 repealed the Act of 1873. Proudfoot, V. C., came to the same conclusion in 1 Appeal p. 579. The Act of 1873 required the lien to be registered, and gave a contractor a lien from the date of registration: sec. 4. The Act of 1872, sec. 2, gives the lien from the *commencement* of the work, and makes no provision for registration of the lien. The work in this case having been commenced and performed before the R. S. O. came into force, the Act of 1874 is the one which governs this case. See also sec. 4, which describes prior mortgage as one "existing or created before the commencement of the work." Even if the Acts of 1873 and 1874 are to be read together, the lien depends not upon registration but upon the work being commenced, and there is nothing in the Registry Acts to give a mortgage subsequent in point of time, but prior in registration priority over the lien.

SPRAGGE, C.—The bill is under the Mechanics' Lien Act by the contractor against the owner, and the decree contains the usual reference to the Master to make all subsequent incumbrancers parties. The plaintiff's case is, that he commenced his work before 31st December, 1877, the date of the proclamation by which the R. S. O. were brought into operation ; that two mortgages were made by the owner, one made , registered 31st May, 1878, the other made , registered 8th June, 1878 ; that the plaintiff registered his lien on 18th June, 1878, and that he filed his bill on the 28th August, 1878.

The plaintiff desired the Master to make the mortgagees parties as subsequent incumbrancers, on the ground that under the Act of 1874 the mechanics' lien attached, by the simple doing of the work without more ; that the Act operated a virtual repeal of the Act of 1873 ; and he cited for that position a case before my brother Blake, of *Walker v. Walton*, 24 Gr. 209.

The Master ruled that the mortgagees were not *subsequent* incumbrancers, and this appeal is from the Master's ruling. Unless the Act of 1874 repeals the Act of 1873, the mortgages are prior not subsequent incumbrances. Since the decision in *Walker v. Walton* the Revised Statutes have been passed and brought into operation, as I have stated ; but Mr. Foy contends that they do not apply because brought into operation after the plaintiff's lien had attached, owing to the decision in *Walker v. Walton*.

But the Revised Statutes are not new enactments, and we find in the Mechanics' Lien Act in the Revised Statutes the provisions in the Act of 1873, which apply to the question before me ; and they contain the usual reference to the source from which they are taken. They then treat the Act of 1873 as still existing law ; and we are not warranted in treating it otherwise. It is not an old Act repealed or virtually repealed, and resuscitated, and again brought into existence by the Revised Statutes, but it is an Act whose then existence is recognized ; and, as an

Act then in force, forms with the Act of 1874, one Act upon the one subject.

It is not necessary to say, that all the provisions of the two Acts are made to harmonize perfectly : the point is, that the sections of the Act of 1873 bearing upon this question are, as sections of that Act made part of the revised Mechanics' Lien Act.

It is true that a portion of these sections is omitted from the Revised Statutes ; the words omitted are : "No lien under this Act shall exist unless and until," before the provision for the registration of a statement of claim by the contractor. This omission may at first appear significant, but the scheme of this provision as to registration, was to assimilate the position of the contractor to that of a mortgage, and so we find it inserted that "when said statement is so registered the person entitled to said lien shall be deemed a purchaser *pro tanto*, and within the provisions of the Registry Act."

The intention of the Act, as revised, appears to me to be very plain. The words omitted are, I take it, omitted because they negatived the existence of a lien as between the contractor and the owner. Section 3 of the revised Act provides for that lien ; then section 4 provides for a statement of claim and the registration, and declares what shall be its consequence ; all which would be simply idle without registration ; the contractor would have the same rights against other incumbrancers. The provision as to the statement of claim, the particulars it shall contain, how it shall be verified, and how registered, are prescribed in the Act with a good deal of precision : why all this if the contractor was to have the same rights without it ?

If the inclination of my opinion had been at all in favour of the position taken on behalf the contractor, I should have directed notice to be served on the mortgagors. As it is, I have not thought it necessary.

I dismiss the appeal. As it has been made *ex parte*, there are, of course, no costs.

Appeal dismissed.

RE KINGSLAND.

Mortgagee—Surplus moneys on sale—Claimant of surplus—Payment into Court—Costs.

Where mortgagees had a surplus in their hands after a sale under their mortgage, and S. claimed the surplus, but refused to give such proof as the mortgagees required of his title thereto,

Held, that as the mortgagees had acted reasonably in requiring proper proof, and failing to get it, had paid the surplus into Court, they were entitled to their costs of so doing, and to their costs of appearing on S.'s application to have the money paid out to him.

[April 7th, 1879 —*Spragge, C.*]

In 1872 one Roland Kingsland executed a mortgage on certain property in favour of Lyman English, John English, and Noble English, executors and trustees under the will of one Noble English.

In 1874 Kingsland assigned a mortgage made by one Biggar to him, to the said executors and trustees in trust to collect the amount due thereunder, and apply the proceeds in payment of the mortgage he had given them in 1872, but no provision was made for any balance that might then remain.

The trustees collected the amount of the Biggar mortgage, which was more than sufficient to pay their claim under Kingsland's mortgage to them.

One Robert Summers, about 1877, claimed from the trustees the surplus in their hands, and produced in support of his claim a copy of an assignment purporting to have been made to him by Kingsland in 1876, of all his interest in any surplus arising from a sale under the Biggar mortgage.

The trustees refused to pay Summers the surplus in the absence of instructions to do so from Kingsland, on the ground that the original assignment should be produced and proof given them that there was no existing prior assignment, and also that his claim had not been otherwise satisfied, as the assignment to him had been expressly made to secure payment of a debt. They also asked for

a bond of indemnity against any loss they might sustain from being compelled to pay the surplus twice.

Summers refused to give any further proof.

On the 29th January, the trustees, by leave of the Chancellor, paid the surplus in their hands into Court. See C. L. J. N. S., March number, page 85.

On the 7th of April Mr. Malone presented a petition on behalf of Summers, praying for an account and payment of the surplus in Court to the petitioner, and that the trustees pay the costs of the application. He cited *Ex parte Hillas*, 6 Irish Jurist, 26; *Re Covington's Trust*, 1 Jurist N. S. 1157; *Re Knight Trusts*, 5 Jurist N. S. 326; *Re Harm's Will*, 15 Jurist, 1121; *Re Waring*, 16 Jurist 652; *Re Elliott's Trust*, L. R. 15 Equity, 194; *Re Hoskin's Trusts*, L. R. 5 Chy. Div. 229.

Mr. Roaf, contra, cited *Re Elgar*, 11 L. T. N. S. 415; *Gunnell v. Whitear*, L. R. 10 Equity, 664; *Mitchell v. Cobb*, 17 Law Times, 25; *Lewin on Trusts*, 1876 edition, 840; *Re Headington's Trusts*, 27 L. J. Chy. 175; *Re Robertson's Trusts*, 6 W. R. 405; *Re Wyll's Trusts*, 6 Jurist N. S. 906; 28 Beav. 458; *Re Brocklesby's Trusts*, 29 Beav. 652; *Re Covington's Trust*, 1 Jurist N. S. 1157; *Re Croyden's Trust*, 14 Jurist 54; *Re Leake's Trust*, 32 Beav. 135; *Re Knight's Trust*, 27 Beav. 45; *Re Elliott's Trusts*, L. R. 15 Equity, 194.

SPRAGGE, C., in giving judgment, said, that the cases referred to on the argument were all cases of express trusts. He referred to the observations of Sir R. Kindersly, in *Re Headington Trust*, 27 L. J. Chy. 175, and to the case of *Re Elgar*, 11 L. J. N. S. 415.

No question of *bona fides* had been raised. The question simply was, whether the proof required by the trustees before paying over the money was reasonable. He thought it was. He doubted whether the rule that gave in cases of this kind priority to those first giving notice to

the holder of the fund, applied to the case of trustees, and referred on this point to *Lewin on Trusts*, p. 502, and *Re Hughes's Trusts*, 2 H. & N. 89. Though the assignment to Summers was registered, he would only have priority over an unregistered prior assignment in the absence of notice.

He thought the trustees entitled to the costs of paying the fund into Court, and of this application.

HEYWOOD V. SIVEWRIGHT ET AL.

Administration—Powers of Masters under G. O. 638.

An administration order was granted by the Master at Chatham under G. O. 638, while a suit was pending for the construction of the will of the testator, in which administration was asked, and in which the executors were charged with misconduct, and before a year had elapsed since the death of the testator.

Upon appeal, proceedings before the Master were stayed, and special directions given to the administration as set forth in the order on appeal.

[*Master at Chatham.*]

[April 14th, 1879.—*Spragge, C.*]

This was an appeal from an order for administration granted by the Master at Chatham, on the 18th March, 1879, under G. O. 638.

Dr. *Snelling*, for the defendants, contended that the administration order should not have been granted by the Master under G. O. 638, because, firstly—The defendants as executors were charged with misconduct. Secondly,—That a suit (*Sivewright v. Sivewright*) was pending, in which the construction of the will of J. H. Sivewright was brought in question, and the Master could not properly

take accounts under the will until the question of its construction was decided, and further, that in that suit an administration was asked for if the Court should deem it necessary. Thirdly,—That the plaintiffs, as legatees and devisees, were not entitled to apply for an administration order, because one year had not elapsed since the death of the testator. Fourthly,—That the application for the administration order should have been made by all the executors of J. H. Sivewright, whereas the order had been granted on the application of Mary Elizabeth Louisa Sivewright, one executrix only.

Mr. C. Moss, contra.

SPRAGGE, C., granted an order directing that if no order for administration was granted in the pending suit of *Sivewright v. Sivewright et al.*, then the plaintiffs might file a bill for administration. In the event of their not filing a bill within one month after the hearing of *Sivewright v. Sivewright et al.*, then the present appeal to be allowed with costs.

If no order for administration was made in *Sivewright v. Sivewright et al.*, nor bill filed by the plaintiff, then the costs of the application and of the administration order reserved.

In the meantime all proceedings under administration order of the Master to be stayed.

SIVEWRIGHT V. SIVEWRIGHT ET AL.

*Examination before Master—Right to be present at—Discretion of Master—
R. S. O. 50, sec. 260.*

Upon the examination of two defendants before a Master, he, at the request of their solicitor, directed two other defendants present on behalf of the plaintiff, who was too ill to attend, to withdraw, but they refused.

The Master thereupon declined to proceed with the examination.

Held, on appeal, that the Master should have allowed one defendant to be present on behalf of the plaintiff, if he was satisfied that this was required for the proper representation of the plaintiff's interest, but by analogy to R. S. O. ch. 50, sec. 260, he might require such defendant to be examined first, if he was to be called as a witness.

[*The Master at Chatham.*]
[April 14th.—*Spragge, C.*]

The plaintiff obtained an order to examine the defendants, Elizabeth Louisa Sivewright and William Sivewright, before the Master at Chatham. On the day appointed for the examination, these defendants appeared, and James A. Sivewright and John P. Sivewright, two other defendants, also appeared. The plaintiff did not appear.

Mr. Wilson, solicitor for the defendants to be examined, asked the Master to request all persons present to leave the room during the examination except the defendants to be examined, and the solicitor for the plaintiff.

Mr. Keefer, solicitor for the plaintiff and agent for Dr. Snelling, solicitor for the defendants, James A. Sivewright and John P. Sivewright, objected to the defendants last named being ordered to leave the room, on the ground that they were present on behalf of the plaintiff, who was too ill to attend. The Master however requested them to withdraw, and on their refusing to do so, declined to continue the examination, and gave a certificate to that effect.

On April 7th Dr. Snelling appealed from the Master's certificate.

SPRAGGE, C.—This is an appeal from the certificate of the Master at Chatham, on the ground that he excluded from his room the two male defendants at the request of the solicitor for the other defendants, on the ground that they had no right to be present at the examination.

Sir Richard Kindersley, V. C., in *Wright v. Wilkin*, 6 W. R. 643, decides *inter alia* that a special examiner has full power to regulate the examination in regard to allowing a short hand writer to be present, or in admitting the public as he pleases.

Sir George Jessel, M. R., in *Re Western of Canada Oil Lands and Works Company*, L. R. 6 Chy. Div. 109, decides that the office of an examiner is not a public Court, and if the presence of the public is objected to the examiner has no discretion to admit them.

The two defendants, sought to be excluded from the Chambers of the Master in this case must have appeared in either of two capacities, either as public on-lookers or as parties to the suit. If they appeared in the former capacity (and their presence was objected to) they certainly, under the two cases cited above, were mere intruders.

They were not interested in the inquiry then proceeding in the Master's Office. But it is suggested that their mother, who upon this inquiry was the hostile party to her daughter, was unable to be present in consequence of illness, and that the presence of some one on her behalf was necessary for the proper representation of her interest. If the Master was satisfied of this, it would be competent for him, and would be proper to allow one of the brothers —whichever under all circumstances he should think most proper—to be present. If one of the brothers was to be called as a witness, it should be the other of the two. If both were to be called he might by analogy to proceedings under R. S. O. ch. 50, sec. 260, require that the one attending on behalf of his mother should be called first.

WILLIAMS V. CORBY.

Impertinence—Striking out Interrogatories—Jurisdiction of Referee—Practice.

The Referee made an order striking out as impertinent certain interrogatories to be administered to a witness under a commission.

Held; on appeal, that the Referee has no jurisdiction to strike out interrogatories for impertinence. The proper course is for the witness to demur to the impertinent question.

[May 13th, 1879.—*Referee.*]

[May 28th, 1879.—*Proudfoot, V. C.*]

In this case a commission had issued to examine a witness in the state of Ohio, and on application of the Judge the Referee made an order striking out certain of the interrogatories as impertinent.

This order was appealed from, and the appeal came on before Proudfoot, V. C.

Mr. Hoyles, for the appellant. The appeal is on two grounds: 1. Because the Referee has no jurisdiction to strike out interrogatories for impertinence alone. 2. The interrogatories in question are not impertinent. *As to first ground:* the old practice of excepting for scandal and impertinence was abolished by G. O. 6. Scandalous matter may be struck out at any time, G. O. 69, 70, but the only provision in our orders for impertinence is contained in G. O. 71. The old English practice must therefore be followed. The rule there is clear that interrogatories cannot be referred for impertinence alone with scandal: *Daniell's Pr.* (1840) 469, 578; *Newland's Pr.* 432. The reason being that it is only at the hearing when the whole case is presented that the Judge can say what is impertinent. Scandal is struck out at any time, because the Court purges its own records, but impertinence affects the purse only and can be made right by directions as to costs: *Pyncent v. Pyncent*, 3 Atk. 556; *Osmond v. Tindall*, Jac. 625; *White v. Fussell*, 19 Ves. 112, The case of *Stocks v. Ellis*, L. R. 8, Q. B. 454, upon which the Referee proceeded does not apply, it proceeds upon express

provision of 1 and 2 Wm. IV. ch. 22. This was passed solely with reference to Courts of Law. Before that Act, to take evidence abroad for use in an action at law, it was necessary to file a bill in Equity, praying for a commission ; *Chitty's Pr.* (1834) vol. II. 347. In proceeding under this and similar statutes applicable to Courts of Law alone these Courts are governed by same principles as those of Equity, but not by same practice : *Lush's Pr.* 854. *As to second ground.* Paragraph 5 of bill alleges usage and custom as being applicable to the position and liabilities of the parties, paragraph 8 of answer, expressly tenders an issue upon this point. Evidence of custom can be received. It would not be safe to go down to trial without it.

Mr. W. Cassels, contra.

PROUDFOOT, V. C.—The Referee in this case made an order striking out certain interrogatories to be administered to a witness under a commission to the state of Ohio, for impertinence. This order has been appealed from upon the ground that the Referee has no power to strike out interrogatories for impertinence, and also, because on the merits, they were not impertinent. With regard to this latter ground, my impression is, that they are impertinent ; but I do not desire to be considered as expressing any decided opinion. Upon the former ground I think the order must be reversed.

Under the former practice it was the rule that exceptions for impertinence alone were not permitted : *Osmond v. Tindall*, Jac. 625 ; *White v. Fussell*, 19 Ves. 112. By our orders exceptions for impertinence have been abolished, G. O. 6. I have referred to the case of *Grant v. McDougall*, before Blake, V. C., but have found no mention of this question having arisen before him ; and he has no recollection of its having been discussed. *Stock v. Ellis*, 8 L. R. Q. B. 454, is a case determined upon the discretionary power given by the statute to the Judge : in fact it was not a case of impertinence at all, for the interrogatories were

deemed pertinent, but that it was not advisable to present them for fear of deterring the witness from attending the commission.

The witness can always protect himself from answering impertinent questions by demurring, and that I think is the only way of taking advantage of impertinence.

Appeal allowed, with costs.

POWELL V. PECK.

Security for costs of appeal—Bond—Execution, stay of.

The bond for \$400 given, under the provisions of sec. 26, ch. 38, R. S. O., is a security for the costs of appeal only in order to stay execution for the costs of the Court below, further security must be given.

[May 12th, 1879.—*The Referee.*]

This was a motion to stay execution for the costs of this suit issued in the Court of Chancery. The plaintiff had filed a bond for \$400 following form A., Court of Appeal orders. This bond was not perfected.

Black, for plaintiff, contended that the effect of sec. 31, ch. 38, R. S. O., making the appeal a step in the cause was to make this bond a security for the costs in both Courts.

Beck, for defendants, referred to G. O. 2 Appeal, and subsec. 4, sec. 27, C. 38 R. S. O.

THE REFEREE thought that further security should be given, an order however was made staying execution for the costs of the Court of Chancery on the plaintiff's agreeing to pay the taxed costs into Court, and the plaintiff was ordered to pay the costs of the motion.

Order accordingly.

RE ROSS.

Master's Office—Production.

In an administration suit a creditor filed a claim in the Master's office for \$11,000, and produced promissory notes for all but a small part in proof of his claim, and offered to allow an inspection of his books at his place of business. The Master as of course ordered a production of the books and vouchers of the creditor in order to shew how the amount of the notes was arrived at.

Held, on appeal that, in the first instance (no special case being made) the Master should not have required the creditor to do more than he offered, *i. e.*, an inspection of the books at the office of the creditor, but if upon that any doubt was cast upon the accuracy of the account and the notes, then production might be ordered.

[*The Master at Barrie.*]

[May 28th, 1879.—*Proudfoot, V. C.*]

This was an administration suit.

McMaster filed a claim in the Master's office, at Barrie, against the estate for \$11,000, and produced promissory notes, signed by the deceased, for the whole amount of his claim, with the exception of a portion of about \$284.45, which was not vouched by notes, McMaster offered to allow his books to be inspected at his place of business.

The solicitor for the estate insisted on the production of the books of the claimant, shewing the items on which the amount of the claim of \$11,000 was grounded.

The claimant objected, on the ground that the notes had not been impeached, and that the production of the books, &c., would require the production of books and invoices extending over a period of ten years.

The Master made an order for production, which order the claimant McMaster appealed from.

The appeal came on before Proudfoot, V. C.

W. Macdonald, for the appeal.

W. Muloch, contra.

PROUDFOOT, V. C.—The claimants appeal from the order of the Master because they have substantiated their claim by notes, and that unless these are impeached they are not bound to produce their books.

In answer to this it is said that there is no mode of pleading in the Master's office, and no means by which an issue can be raised, so as to question the validity of the notes, or impeach the accuracy of the account; and that a claimant seeking to prove a claim must be prepared to answer every objection that can possibly be suggested to the claim, without any pleading or record of the issue.

I am not disposed to limit the power of the Masters to order production, though it is a power that ought to be exercised within reasonable limits. If there were pleadings, the production would be limited by the state of the pleadings; and where there are no pleadings, as alleged, the Master should in some way be placed in possession of the issue intended to be raised. There is no difficulty in doing this, even without pleadings. Here there is *prima facie* proof, under the hand of the debtor, of the correctness of the claim. Before ordering a production, which before decree could only, in such a case, have been obtained by suggesting grounds for impeaching the notes, the Master, I think, should have required an affidavit, suggesting some reason for investigating the account : G. O. 222, evidently intended that an order to produce so extensive as that in this case should not issue as a matter of course, but the master is to determine what books, &c., are to be produced, and whether to be delivered, or only inspected, &c., and the exercise of this power may be the subject of appeal, like any other power with which he is invested. It plainly never was contemplated that the abstract right to production should be followed by an order to produce without limits.

In this instance the claimants offer to the executors liberty to inspect their books whenever, and as long as, they wish, either in person or by an accountant, and I think that is all the Master should, in the first instance at least, have required them to do.

If upon that inspection anything should arise to warrant a doubt as to the accuracy of the account and the notes, the Master will have power to order production.

I observe that a small part of the account (\$284 45) is not vouched by a note; if the executors desire, the books as to this sum must be produced.

I think the order should be reversed, the claimants undertaking to permit inspection, as in their affidavit, and producing the books referring to the item of \$284 45, and I think them entitled to their costs.

RE McDONALD, McDONALD, AND MARSH.*

Taxation of costs—Third party clause—Taxation of mortgagees' costs by subsequent encumbrancers.

First mortgagees sold under a power in their mortgage, and paid their solicitors costs of sale.

A subsequent encumbrancer obtained from the Referee, on motion, an order for the taxation of the mortgagees' costs.

This order was reversed on appeal, on the ground that the mortgagees could not tax the bill, and the mortgagor stood in their place. An objection that the order should have been obtained on petition, not notice, was disregarded.

[June 3rd, 1879.—*The Referee.*]

[June 9th, 1879.—*Proudfoot, V. C.*]

This was an appeal from an order, granted by the Referee to a subsequent encumbrancer, to tax costs paid to a solicitor, on sale by first mortgagee.

The facts appear in the judgment.

Mr. Marsh, for the appeal, contended on behalf of the solicitors that the application for taxation should have been made upon petition, and not by notice of motion; that the

* See, *supra*, *Re Crerar and Muir*, page 56.

mortgagees should have been made parties to the application : *Re Baker*, 32 Beav. 526 ; *Re Jessop*, 32 Beav. 406 ; that the mortgagees had never been brought properly before the Court since the only notice of motion served in the matter was the one that had been left with the solicitors, and they had *admitted service* on themselves, adding after their admission "Solicitors for the Trust and Loan Company," that no *acceptance of Service* for the company had been given ; that the words added after the admission were a mere description or designation of the firm, and were only an admission of the fact that the paper had been left with them and not meant to imply that the service was made on them for the mortgagees, and that the Referee was wrong in holding that the mortgagees had been properly brought before him : that the applicants as regards their right to a taxation under the Act stood merely in the shoes of the mortgagees, who having paid the bill of costs could not now tax it as against the solicitors except upon showing "special circumstances," and none such were shewn ; and that the Act gave no right to a taxation as against the mortgagees ; *Re Massey*, 34 Beav. 463 ; S. C. 13 W. R. 797.

Mr. Riordan, contra.

PROUDFOOT, V. C.—The Trust and Loan Company were mortgagees of some property under a mortgage made by one Roe. They sold it to satisfy their mortgage, and after paying their claim and the cost of their solicitors a surplus remained, which was claimed by Abell, a subsequent incumbrancer.

Abell applied to the Referee for, and obtained an order for the taxation of the bill of costs of the solicitors as between solicitor and client, and in case of any reduction that the mortgagees and their solicitors should pay the same to Abell.

The notice of motion for that order, and the affidavit on which it was founded, contained no statement of any specific overcharge upon which to order the taxation. The

affidavit says that the company have paid or retain to pay the costs of the solicitors a larger sum than the solicitors are entitled to, if a proper taxation was had. The affidavit of one of the solicitors shows that the company had actually paid them their costs. To this order it was objected that it was made without notice to the mortgagees. The order purports to have been made after hearing the solicitors for the mortgagees, and perhaps I ought not to listen to argument questioning this as a matter that occurred in the presence of the Referee; and it is said that the service of a copy of the notice of motion was admitted only, not accepted, by the solicitors, leaving them open to object that it was not shewn they were solicitors.

And it is objected that there is no evidence establishing this. Whether there was an admission only, or an acceptance, I apprehend it establishes the fact of their being solicitors.

But I need not consider this further, for I do not think notice to the mortgagees was necessary. *In re Jessop*, 32 Beav. 406, and *Re Baker*, 32 Beav. 526, the Master of the Rolls indeed considered it necessary, but that was on the assumption that a taxation might be had between the mortgagor and the mortgagee, a position which he afterwards abandoned: *In re Massey*, 34 Beav. 463. These cases, however, establish this: that under the third party section, R. S. O. ch. 140, sec. 43, if the mortgagee have precluded himself from taxing the bill, the mortgagor, who is to stand simply in his place, cannot do it. And the section does not authorize a taxation as against the mortgagee.

If he has paid to the solicitor more than he ought to have done, the only remedy the mortgagor has, is by a bill for an account: *Re Massey, supra*.

There are no special circumstances stated here that would authorize a taxation by the mortgagor. The special circumstances referred to in the Statute which would induce the Court to order taxations after payment (sec. 47) have been held to be pressure and overcharges amounting

to fraud : *Morgan & Davey*, 323. There is no case alleged here on either ground. The case of A. & B., two, &c., 6 Pr. R., 68, really decides nothing applicable to this case. *In re Glass*, 3 Pr. R., 138, determines that a mortgagor is a third party within the Act so as to entitle him to have the bill taxed, and no objection seems to have been made on the ground that the bill had been paid, and therefore that neither mortgagee nor mortgagor had a right to have it taxed in the absence of special circumstances. If it had been then the passages quoted by Hagarty, C. J., from Smith's C. P., and *ex parte Bignold*, show that the objection would have prevailed.

I need not consider the other objection, that the application should have been by petition and not by motion.

There is a difficulty in defining what matters require to be by petition, but in a case of this description a motion is, I think, sufficient. I allow the appeal, with costs.

LONDON CANADIAN LOAN AND AGENCY COMPANY V. THOMPSON.

Absconding defendant, who was assignee in insolvency—Substitutional service—Inspector.

Where a bill had been filed for foreclosure, and the defendant, the official assignee of the mortgagor, absconded before the bill was served, an order was granted allowing substitutional service on one of two inspectors of the insolvent's estate.

[June 5th, 1879.—*The Referee*]
[June 12th, 1879.—*Proudfoot, V. C.*]

A bill had been filed by the plaintiffs to foreclose a mortgage held by them. The defendant, Thompson, was the official assignee of the mortgagor, but before service of the bill was effected Thompson absconded.

Arnoldi applied to the Referee for an order allowing substitutional service of the bill on one of the inspectors of the insolvent's estate. He read an affidavit of one of the inspectors stating that the defendant Thompson had absconded, that steps were about to be taken to appoint a new assignee, though no one had yet been appointed, and that there were two inspectors of the estate. He quoted sec. 29 Insolvent Act, 1875, shewing that creditors can appoint a new assignee in cases of this kind.

The REFEREE refused to grant the order, but, at Mr. Arnoldi's request, referred the matter to a Judge in Chambers.

PROUDFOOT, V. C., made an order allowing substitutional service on one of the inspectors.

RE GOFF.*

Statute of Limitations—Revocation of will—Possession by agent for infant.

Trustees, under a will executed by a woman who afterwards married, received on behalf of an infant devisee the rent of certain land from the tenant. When the infant came of age the tenant paid the rent to her. Subsequently and after more than ten years had expired, since the trustees first received the rent, the heir-at-law of the testatrix claimed the land, on the grounds that the will was revoked by the subsequent inter-marriage of the testatrix, and that the Statute of Limitations did not run for or against an infant.

Held, (without deciding as to the revocation of the will,) that the possession of the trustees was the possession of the infant, and she thus acquired a good statutory title to the land.

[March 28th, 1879.—*Referee of Titles.*]

[April 21st, 1879.—*Proudfoot, V.C.*]

Mary Ann McCandless, a spinster, being entitled to the fifty-three acres of land in question, on the 5th of November, 1862, made a will, whereby she empowered her executors to sell the land in question, and in case she left issue to

* In Appeal.

divide the proceeds equally between such issue for their maintenance and education ; and if she left no issue, then out of the proceeds to pay her aunt Mary Parks \$500, and the balance that should be left was to be given to her cousin Susan Burns, the petitioner, for her own use and benefit. Of this will David Burns and Robert Jordan were appointed the executors. In 1863, the testatrix married one James Winnacott, and in 1864 she and her husband were lost at sea in the wreck of the steamship *Anglo Saxon*.

At the time of her death the property was leased to one Riseborough under a lease which had then two years to run. Riseborough, the tenant, attorned to David Burns, one of the executors named in the will, and paid his rent to Burns until the year 1865, when Wm. Riseborough, his son, became tenant, and paid rent to Burns continuously until he died about 1872, after which he paid rent to Robert Jordan, the surviving executor under Mary Ann McCandless's will, until the petitioner came of age, since which time the rent was paid to her or her assignee. The rents received by Burns and Jordan were duly accounted for by them to the petitioner, and paid to her or applied for her use, after deducting thereout the legacy to Mary Parks. Susan Burns (now Goff) subsequently filed a petition to quiet the title to the land in question, and in the course of these proceedings a claim was filed by Alexander Hunter, claiming to be one of the heirs-at-law of Mary Ann McCandless or Winnacott, and also assignee of others of her heirs-at-law.

W. Cassells, for the petitioner.

J. H. Macdonald, for the contestant.

REFEREE OF TITLES.—The question arises whether, as against the contestant, the petitioner has acquired a good possessory title, it being admitted that the will of the 5th of November, 1862, was revoked by the subsequent mar-

riage of the testatrix. I have no doubt that this question must be answered in the affirmative. The possession of both Burns and Jordan was under the will of which they have assumed to act as trustees, and I have no doubt that the possession acquired by them enures to the benefit of this petitioner, the *cestui que trust* under the will : *Darby* on Limitations, p. 394; *Hawksbee v. Hawksbee*, 11 Hare 230 ; *Rackham v. Sidall*, 16 Sim. 297, 1 Mac & G. 607 ; *Life Association of Scotland v. Siddall*, 3 D. J. F. & J. 58-271.

Although the question of the revocation of the will in question was practically conceded by the petitioner, I do not think it is by any means clear that it was in fact revoked. The rule of law that the will of a woman is revoked by the subsequent marriage of the testatrix was established at a time when a married woman could not make a will of her realty, and the reason of the rule was, that if it were not thereby revoked, then inasmuch as she could not during her coverture make a new will, the will made previous to her marriage would become by her own act irrevocable, which was contrary to the nature of a will.

But at the time this lady married the Legislature had already placed on the Statute Book an Act enabling married women to make wills of their lands : C. S. U. C., ch. 73, sec. 16. The reason of the former rule, therefore, seems to have been taken away, and I am inclined to think the rule must be now held to be modified, if it be not entirely abrogated, on the maxim *cessante ratione legis, cessat ipsa lex*. It is, however, unnecessary for me to decide this point, and I merely wish to guard myself against being understood in any way to concede that upon the evidence before me in this case, that there was in fact any revocation of the will in question by the mere fact of the subsequent marriage of the testatrix : See *Jarm.* 114-6.

The claim of the contestant is barred, but without costs : *Low v. Morrison*, 14 Gr. 192.

This decision was appealed from, and the appeal came on before Proudfoot, V.C., on Monday, the 3rd of March, 1879.

J. H. Macdonald for contestant (appellant). The petitioner claimed by length of possession. The greater portion of the time during which she claimed that she was in possession a man named Riseborough was in actual possession, paying rent to the father of the petitioner. The father did not claim to be in possession himself, but professed to receive the rents as agent for the petitioner. An infant could not obtain a title by her own occupation by reason of her infancy. The statute does not run for or against an infant. If she could not on account of her infancy acquire a title by her own occupation, she could not by the occupation or possession of any person assuming to act for her. An infant cannot appoint an attorney : *Oliver v. Woodroffe*, 4 M. & W. 650 ; or an agent : *Doe v. Roberts*, 16 M. & W. 778. Such an appointment is void : 1 *Rolle Abr.* 730. A letter of attorney by an infant to deliver seizin is void, and any person who claims by virtue of it may be treated as a wrongdoer : 2 *Roll's Reports* 242, *Bacon Abr. Inft. I.*, 3. An infant is not guilty of forcible entry or disseizin by barely assenting to, or commanding one to his use, for such a command is void : *Bacon Abr. Inf. H.*; and there has not been during the period in question actual possession to be protected under the Statute : *Lloyd v. Henderson*, 25 U. C. C. P. 253.

Mr. *W. Cassels* for the devisee (respondent), contra.

PROUDFOOT, V. C.—It appears that the fifty-three acres were all fenced in, and from the death of the testatrix have been occupied and cultivated by the tenants.

I do not think it necessary to express any opinion upon the subject of the revocation of the will, as the petitioner abandoned her claim under the will, and rested her right upon possession. The referee has found her so entitled, and has barred the claim of the contestant.

I think the Referee was right. Whether an infant could acquire the title by personal occupation need not be decided, as here the infant did not so occupy ; but there

seems to me no question that persons assuming to possess for an infant, actually possessing, and accounting to her for the rents and profits, may thus acquire for the infant a title by possession. And it is of no importance whether the possession of the trustees was rightful or not. Here the tenant has been in possession all the time; he does not claim to be holding for his own benefit; he pays rent to Burns and Jordan, who, I will assume, had no title; the tenant's possession then becomes the possession of Burns and Jordan; they do not claim to hold for their own benefit, they say our possession is not for ourselves, we hold for the petitioner; they pay her the rents; they assumed to act under the will, and they could, so far as they and the petitioner were concerned, give it validity. They could not claim to hold it as against the petitioner, having assumed to enter under the will by which they were trustees for the petitioner. But there is no contest between Burns and Jordan and the petitioner.

I have referred to the cases cited on the argument, but do not think it necessary to comment upon them in detail. The principle upon which the petitioner's right rests, it seems to me, is a plain and simple one. There is no question whether an infant can appoint an agent or an attorney. The simple point is, whether those who have possessed long enough to extinguish the plaintiff's right as heir-at-law, may not have that possession for the benefit of another. I think they can.

The referee was quite right, and the appeal is dismissed, with costs.

MASTER'S OFFICE.

TRUST AND LOAN COMPANY v. GALLAGHER.

Discharge of mortgage—Effect of, before registry.

The plaintiffs, the Trust and Loan Company, advanced \$2,000 on certain land, on condition that three encumbrances against it should be discharged out of the proceeds of their loan and otherwise. The first and third encumbrancers were paid off, and the former executed a statutory discharge of their mortgage, which was never registered. Subsequently the second encumbrancer, who had not been paid, claimed priority over the plaintiffs. They then obtained an assignment of the first mortgage. *Held*, that the discharge of mortgage not having been registered, operated only as a receipt, and the amount paid the first encumbrancer being paid by the Trust and Loan Company, and not by the original mortgagor, that the plaintiff was entitled to priority to the extent of the first mortgage.

[May 15th, 1879.—*The Master in Ordinary.*]

The facts appear in the judgment.

Mr. Marsh, for the plaintiffs, contended that before making any payment to the first incumbrancer they had incurred certain expenses in investigating title, &c., which under the terms of their mortgage was an advance upon the security thereof, and that they were therefore incumbrancers at the time of their advance to the first mortgagees, and were as such entitled to pay off the first incumbrance to save their security and charge the moneys on the lands as Salvage moneys: *Walker v. King*, 44 Vermont 602, 610, 611; *Sanford v. McLean*, 3 Paige 122. The mortgagor had given a written order to the plaintiffs to pay the proceeds of the loan to James Bailiff, and the plaintiffs chequed the moneys to Bailiff, "acting for Hugh Gallagher." Bailiff was throughout the whole matter in contest acting as agent for the

mortgagor and not for the plaintiffs, and the present state of facts had been brought about by the fraud of Bailiff who had acted contrary to the plaintiffs' instructions. This was undoubtedly a case where relief would be given to the plaintiffs in the event of the money having been paid inadvertently or by mistake: *Barnes v. Mott*, 64 N. Y. 397; *Davis v. Winn*, 2 Allen 111; *Smith v. Drew*, 25 Gr. 188; *Howes v. Lee*, 17 Gr. 459; *Earl of Buckingdam v. Hobart*, 3 Swanst. 186; *Kirkham v. Smith*, 1 Ves. Sr. 258; *Ex parte Mutton*, L. R. 14 Eq, 183, and there is an equal equity for relief where the money has been paid in fraud of the plaintiffs, as in this case. That the plaintiffs title as assignees of the first mortgage was perfectly valid, they had the legal estate and would be protected by it against all persons who could not shew a greater equity than the plaintiffs, and this the defendant Rocque could not do, and the plaintiff's action had placed him in no worse position than formerly: *Barker v. Eccles*, 17 Gr. 635; that the discharge of mortgage given was a mere receipt for money and did not act as a discharge until registered, but even had it been registered it would have conveyed the legal estate to the plaintiffs: *Bullard v. Leach*, 27 Ver. 495; *Pease v. Jackson*, L. R. 3 Chy. 576. The cases relied upon by the defendant Rocque appear all to be founded upon *Toulmin v. Steere*, 3 Mer. 210, as to which, see *Fisher on Mortgages*, 3rd ed., pp. 806, 807, and 808, where it is shown that this case has been practically overruled. See, also, *Dart on V. & P.*, — ed., p. 839, where it is shewn that *Toulmin v. Steere* is inaccurately reported; and that relief was given against the defendant *qua* owner of the equity of redemption, and not *qua* mortgagee. See, also, remarks of Draper, C. J., in this case in *Hart v. McQuesten*, 22 Gr. 136; *Toulmin v. Steere*, as reported and all the cases following it, appear to proceed upon the principle of merger, they being cases where the owner of the equity of redemption had paid off a prior charge. Here no question of merger arises, and that distinguishes this case from those relied upon by the defendant.

Dr. *Snelling*, for the defendant *Rocque*.

THE MASTER IN ORDINARY.—When Gallagher applied to the plaintiffs for a loan there were existing incumbrances upon the property—two mortgages, the first held by a Building Society, the second by the defendant Rocque, and an execution at the suit of The Canadian Bank of Commerce. The loan having been approved of, and a mortgage to the plaintiffs executed by Gallagher, the money, \$2,000, was advanced by three cheques; one of these was made payable to the Building Society for the amount of their mortgage, another to the Bank of Commerce for the amount of their execution. The third, for the balance of the loan, was payable to the order of James Bailiff, Gallagher having signed an order to pay the money to him. The amount of the cheque was not sufficient to pay the Rocque mortgage in full. To obtain a discharge of that it was necessary for Gallagher to provide for the mortgage, or make some other arrangement with Rocque.

The three cheques were sent to Bailiff, and he was instructed to hold them, and not to use any of them unless discharges of all the three incumbrances were forthcoming. The company would not take a second mortgage, and in order to secure them by a first mortgage, it was necessary that the three existing incumbrances should be discharged. What Bailiff in fact did was, he handed the cheque for the amount due the Building Society to the society, and the cheque for the bank's execution to the sheriff. The third cheque he endorsed and held. Whether he paid over the proceeds to Gallagher or retained them, does not appear. At all events he did not obtain a discharge of the Rocque mortgage. About this time the attorney in the office of the plaintiffs' solicitors who had charge of this matter died, and through some looseness, &c., they, the plaintiffs, do not appear to have made any enquiry about the title deeds and papers connected with the loan until about fifteen months after. Then learning that some one claimed to have a mortgage on the property prior to their own,

enquiry was instituted. The plaintiff's solicitors employed their Ottawa agent to make this enquiry. He then found that the Rocque mortgage had not been discharged, and he also found in the hands of the solicitor of the Building Society at Ottawa the mortgage to the society and some of the title deeds. Among these was a statutory discharge of the Building Society mortgage duly executed, but which had never been registered. These were handed over to him by the society's solicitor, but the same day, or a few days after, he handed back the discharge. Since then the plaintiffs have obtained an assignment of the Building Society mortgage, and by virtue of that claim priority over Rocque. The question is, are they entitled to such priority.

The statutory discharge never having been registered, was in fact nothing more than a receipt for so much money paid to the Building Society. It could operate as a discharge of the mortgage, and as a reconveyance of the estate of the mortgagor, only by its registration. It did not until then release the mortgagor from any of the covenants contained in the mortgage. Here the money due to the Building Society was not paid by the owner of the equity of redemption, but by the plaintiffs. Their bargain with Gallagher was to advance him a certain sum of money, obtaining as security therefor a first mortgage upon the property in question. They did in fact pay off certain of his liabilities, but by the default of the person to whom he had authorized the money to be paid, they failed to obtain all that they bargained for. They were therefore, in my opinion, entitled to protect themselves by obtaining an assignment of the Building Society mortgage, and are entitled to priority over Rocque to the extent of the amount paid to the Building Society.

I think the society could, upon the discharge, which had never been registered, and never even delivered to the plaintiffs, being handed back to them, execute an assignment of their mortgage to the plaintiffs, and that the plaintiffs, having advanced the money on the agreement

ERRATUM.

In the eighth line of the head note to *Re Ford*, 7 P. R. 51, erase the word "not" and read "the surviving executor could make a good title," &c.

that they should have a first charge upon the property, are entitled now to a first charge to the fullest extent they can have it under the Building Society mortgage.

The cases cited against the plaintiffs' contention are cases where the payment of prior incumbrances were made by owners of the equity of redemption, and where the question turned on the intention to discharge them or to keep them alive. The case of *Toulmin v. Steere*, 3 Mer. 210, much relied on, seems overruled, and that of *Adams v. Angel*, 5 Ch. D. 634, seems to me rather an authority for the plaintiffs than against them.

COMMON LAW CHAMBERS.

IN RE AN ATTORNEY.

Attorney and client—Moneys for investment—Loan to the attorney—Reference to the Master.

The fact as to whether moneys collected by an attorney had been afterwards loaned to him by the client, was disputed; but an undertaking was produced, signed by the attorney, to the effect that he held the moneys for investment.

Held, that if the transaction was afterwards turned into a loan to the attorney, he must be prepared with the clearest evidence of the change in the relation, otherwise the usual order against the attorney must be made; and in this case the evidence was held to be insufficient.

Held, that where an order directing a reference to the Master has been made in Chambers, in such a case, and the reference completed under it, an application for relief therefrom must be made to the Court.

[June 17, 1879.—*Osler, J.J.*
[Trinity Term, 1879.—*Common Pleas.*]]

On the 17th February, 1879, an order was made by Mr. Dalton, sitting in Chambers, upon reading a summons granted by him on the 7th February, and upon hearing counsel for the parties, that the attorney should within one week after service of the order deliver to William Kinney, of the township of South Dumfries, farmer, an account in writing, shewing all moneys received by him from or on account of the said Kinney, and that in default of such delivery it should be referred to the Master of the Court to ascertain the amount due from the attorney to the said Kinney including interest on the sums received by the attorney for him, but deducting therefrom whatever the Master should upon the said reference find to be due from the said Kinney to the said attorney for the costs or dis-

bursements of the said attorney for services performed by him for the said William Kinney, as his attorney, and that the attorney upon the conclusion of such reference should pay to the said Kinney, such sum including interest, as on the said reference should be found due by the attorney to him, together with the costs of the application and of the reference to be taxed. And lastly, that upon the conclusion of the reference the attorney should deliver up all books, papers, &c , in his possession and belonging to the said Kinney.

The order was made upon an affidavit of the applicant, which stated that for some years back, and until a short time previously, the attorney had been acting as his attorney in investing and collecting moneys, and in other matters: that about the 22nd April, 1876, the attorney informed him that one Pepper desired to pay off a mortgage for \$1,400, which the attorney had in his possession, and asked him to execute and leave with him, the attorney, a discharge of the same, and leave the money with him for reinvestment. The applicant executed the discharge of mortgage, and the attorney gave him a receipt for the money in these terms:—"Brantford, April 22nd, 1876. Mr. William Kinney has signed discharge of mortgage of George Pepper to him for \$1,400, which money with interest from 7th February, 1876, at 8 per cent. is to be reinvested, so as no interest shall be lost, on good real estate security."

About a month or six weeks afterwards Kinney called at the office of the attorney, and on asking whether he had reinvested the money, was told by him that he had let one Elliott have the money, but had not taken a mortgage as the property was encumbered, and as soon as the title was clear he would obtain the mortgage. The applicant received interest on the \$1,400 from the attorney at 8 per cent., up to the 27th May, 1876, and was told that the attorney had let Elliott have the money on the 1st day of June, 1876. Thereafter he received interest from the attorney up to June, 1878. Some time during the

summer of that year he stated to the attorney that he, Kinney, believed that the attorney had used his money himself instead of investing it, and he admitted the fact. Since that time Kinney had pressed him continually for repayment, having frequently before asked him for the mortgage or other security which he supposed he had taken. The client had been in the habit of leaving with the attorney all his mortgages for moneys loaned for him by the attorney, merely taking a memorandum in a small pass-book of the amounts, rates of interest, and times at which principal and interest were payable, and the attorney was in the habit of collecting the interest and paying it over when due.

To the affidavit containing the above facts several letters were annexed, which had been written by the attorney to the applicant in December, 1878, and January, 1879, excusing delay and promising attention.

It was admitted that on the return of the summons the attorney had made an affidavit alleging that the money had been lent to him by Kinney. The affidavit had not been filed and could not be found.

The order was taken into the Master's office, and was served on the attorney with an appointment for proceeding with the reference. The attorney did not appear on the reference, and on the 12th March, 1879, the Master made his report, finding that the attorney was indebted to Kinney at the date of the report in the sum of \$1,487.44 : that he had taxed the costs of the reference at \$29.28, which being added to the sum of \$1,487.44, made in all the sum of \$1,516.72, due from the attorney to Kinney under the order and report. The report was served on the attorney on the 14th March, and again, together with another copy of the order, on the 9th May.

On the 21st May, *Spencer* obtained from Mr. Dalton in Chambers a summons entitled in the matter of the attorney, calling upon Kinney to shew cause before the presiding Judge in Chambers why the order of the 17th of

February should not be set aside or varied, on the ground that the moneys in question were loaned to the attorney by Kinney, and constituted an ordinary debt, and did not properly form the subject of a summary application against him, and on the ground of the discovery of evidence since the making of the order, proving the fact of the loan. The learned clerk of the Crown noted on the summons : "I give this summons that the matter may be argued, believing that my order was right when it was made, and say nothing as to the right to produce evidence not then before me."

The material filed on obtaining this summons consisted of a copy of the order complained of, a notice served on the attorney on the 9th May, demanding payment of the money found due by the report, and that in default of payment application would be made for a rule to strike the attorney off the Rolls; and of the affidavits of the attorney, his two sons, and one Elliott.

F. V., a son of the attorney, and a practising barrister, stated that in June, 1878, Kinney came into the attorney's office one day, and enquired for him. He was out, and "The said Kinney then informed me that the said attorney had \$1,400 of his which he had let him have to invest in the year 1876, but the loan not having been effected, he had thereupon loaned the money to him the said attorney on interest at 8 per cent., payable half-yearly, which was just as satisfactory, and the said attorney had paid him the interest regularly every six months from that time. He then enquired of me, if I thought that the attorney had that much money on hand now ; to which I replied that I did not think he had. Kinney then told me that the reason he wished to know was, because he wanted to procure the principal if he could, in order to use it in some farm purchase, and thus save giving a mortgage and interest himself. After said attorney came in, he and Kinney were closeted together in the attorney's private office for fifteen or twenty minutes, when Kinney came out alone, walked up to me where I was standing writing, and with a smile

ing countenance and in a low tone of voice, told me I was right, that the attorney had not funds enough on hand to repay him then, but thought he would have in a month or two. He added that he had got a cheque for his six months' interest, all the same. * * Asked me not to mention to the attorney what he had told me, as he would not have told me only he supposed I knew all about it.

* * I asked Kinney if he had taken a note or a mortgage for his money, and he said no, he never asked for any."

The deponent then went on to state, that the first he knew of the proceedings in this matter was when on a visit to the attorney on the 6th April, 1878, and that he then related to him for the first time in the presence of his brother, the circumstances of the conversations above detailed. Whereupon, the brother stated that he had also had a similar conversation with Kinney, in which Kinney had told him the same thing as to the money. He then proceeded to describe an interview which he and one Thomas Elliott had had with Kinney on the 8th April, at which he endeavoured to get Kinney to admit the fact of having said that the money was loaned.

G. R., a son of the attorney, deposed, that in the month of August last, while employed as a clerk in the office of the attorney he had a private conversation with Kinney, in which the latter informed him that he had loaned the money to the attorney.

Thomas Elliott deposed to what took place at the conversation on the 8th May, spoken of in the affidavit of F. V.

The attorney in his affidavit stated, that as he was not aware at the time the order and report were made, that any one, save Kinney and himself, knew the circumstances connected with the loan, he could not see his way to getting rid of the order or freeing himself from the consequences that might follow, should the matter be pressed. He then described how and when he received the information which his sons gave him as to their knowledge of the transac-

tion, and proceeded : "On or about the 1st June, 1876, there was in my hands of the moneys of Kinney \$1,400, which the said Kinney instructed me to loan on mortgage security at 8 per cent., payable half-yearly, to one John Elliott, if security satisfactory. I prepared the mortgage in duplicate to be executed by one John Elliott, but on looking into the title found the same unsatisfactory, and by reason thereof the loan fell through, and soon afterwards I so informed Kinney, and also stated to him that if it was satisfactory to him, or words to that effect, I would keep the money, and pay him for the use thereof at the rate of 8 per cent., half-yearly, for the time it remained in my hands : that said Kinney expressed himself quite satisfied, and stated that he would loan me the money as soon as any one. It was not loaned to me for any definite time, I was liable to repay it at any time on reasonable notice. The said Kinney afterwards received interest from me, well knowing that I was paying it upon the said money, as a loan from him, until December last, when he refused to receive payment, demanding the whole of his money.

In reply Kinney, the applicant, said that he might have had a conversation with F. V., as he was frequently in the attorney's office ; but he denied that he ever informed him that he had loaned to the attorney the \$1,400. He recollects that he told F. V. that his father had moneys of his in his hands to put out on mortgage, and had not done so, and he, Kinney, did not know but that he had put it to his own use, and that F. V. seemed angry that such a thing should be imputed to his father. He denied the alleged conversation with G. R. as to the loan of the money, but said that he did speak to him as to the moneys in his hands for investment.

He stated that when F. V. and Elliott came to see him the former wanted him to take a mortgage for the amount due, on property in Brantford already encumbered, which he refused, and upon this F. V. began to refer to the alleged conversations as to the money being loaned to the attorney,

to which he, Kinney, replied that there was no truth in it, and he knew it. He denied positively the fact of the loan to the attorney, and that he was told that the loan to Elliott had fallen through.

June 10, 1879. *Aylesworth* shewed cause. He urged that the application for relief was too late and not in the proper form. That if maintained in form, it should be dealt with in the same manner as an application for a new trial on the ground of the discovery of fresh evidence, and tried by that test the case was not made out. On the merits, the order should not be interfered with. He cited *Re Currie, an Attorney*, 7 Pr. Rep. 174; *McDermott v. Ireson*, 38 U. C. R. 1; *Scott v. Scott*, 9 L. T. N. S. 454; *Fawcett v. Mothersell*, 14 C. P. 104; *Cooke v. Perry*, 1 Wilson 98. The attorney should be prepared with very clear evidence of the character of the transaction.

Spencer supported the summons. If there was a loan, the Court cannot exercise summary jurisdiction, as the relation of attorney and client does not exist. Here the attorney, no doubt, received the money at first for the purpose of investment, but it is now clearly proved that the client loaned it to him. He distinguished the present case from *Re Currie*, above cited. The application is right in form. He cited *Re Campbell*, 32 U. C. R. 444; *Re Robinson*, 10 B. & S. 75; *Re Sparks*, 17 C. B. N. S. 727.

OSLER, J.—In *Shaw v. Nickerson*, 7 U. C. R. 541, Sir J. B. Robinson, C. J., said: “A Judge sitting in Chambers must be allowed to have authority in his discretion to open up again an order which has been granted by himself, or even to rescind it, before it has been carried into effect, upon his discovery that he has made it inadvertently, or that he has been surprised into making it by any perversion or concealment of facts.”

In the case before me the order complained of was made after hearing the parties, and upon a full disclosure of their case on both sides. It has been carried

into effect and the reference completed under it, and the present application is made to open it up, just as proceedings were about to be taken to enforce payment of the amount found due by the report, the ground being that the attorney has discovered fresh evidence in support of the case set up by him in the first instance.

The motion is, therefore, not within the rule in *Shaw v. Nickerson*. It does not come up by way of appeal, but is an original application for relief against a regular order and proceedings thereon. It should therefore have been made to the Court. I have, however, considered the facts urged in support of the application, because if I am of opinion that the attorney is entitled to relief, I would refer the matter to the Court, so that he should not be turned round upon the mere question of form.

Upon the affidavits there is no doubt that the attorney received the money in question in the first instance for the purpose of investing it on good real estate security, with interest at 8 per cent., and that he had for several years been employed by Kinney, (an old man upwards of 73 years of age), as his attorney. He now seeks to divest himself of his professional character in relation to this money, alleging that at some time after June, 1876, he was permitted to retain, without note, mortgage, or other security or memorandum evidencing the transaction, the money, of which his client had previously in writing so carefully directed the investment. In support of this contention, he points to the fact that he had regularly paid interest to Kinney, every half-year, from the 1st June, 1876, and produces the affidavits of his two sons as to conversations with Kinney, in which he is alleged to have told them that the money had been lent to the attorney. Kinney positively denies having ever said so to either of them, and gives his own account of what was said on the occasion referred to. Looking at all the circumstances under which the alleged conversation took place, and giving the deponent the fullest credit for a desire to state the facts fairly, it would be extremely

unsafe for me to act upon evidence of loose statements, made without any apparent object, in opposition to the clear and distinct written evidence in the attorney's own handwriting, of the terms on which he received the money. No weight can be attached to the circumstance that the attorney regularly paid the interest to Kinney, because this is exactly what would have been done had the money been invested. It is sworn, and is not denied, that the attorney was in the habit of collecting and paying over to Kinney, interest on other moneys which he had invested for him, and that Kinney had no personal communication with the borrower.

It was the duty of the attorney, even if he could permit himself to become the debtor of his client in the manner he has described, to be prepared with the very clearest evidence of the change in their relation. "An attorney is an officer of the Court, and in that character responsible for the protection of his client from all acts which may prove detrimental to his interest. It is his duty to apprise him of the legal consequences of his actions, and he ought to be able to lay before the Court, when called upon, a ready account of their mutual transactions, and to be able to corroborate them by evidence": *Lewis v. Morgan*, 5 Price 56.

In the case of *Harrison v. A. & B., Attorneys*, 6 U. C. L. J. 91, the attorneys having collected moneys for their client, had given him an undertaking to pay them, and in default, that a summary application might be made to the Court to compel payment. It was contended by the attorneys that the money had been loaned to them. This fact was disputed. Richards, C. J., said: "I think the ends of justice will be best subserved by holding these gentlemen to their undertaking. * * They are both professional men, and know very well the effect of signing an undertaking like the one produced. To let professional men avoid such agreements they must shew facts clear and precise to warrant that course."

The attorney, in the present case, asks me to hold that

this money which he received for the express purpose of investing upon good security, has been converted into a loan to himself, without any security at all. He asks me to assume this upon evidence, which is contradicted, of conversations with his client. It is not necessary for me to discredit the attorney, but upon principle and authority, I am of opinion that he has failed to shew that he is in a position to answer his client's demand.

I therefore discharge the summons, with costs.

In Trinity Term following, *Spencer*, for the attorney, moved before the full Court of Common Pleas for a rule *nisi* by way of appeal from this judgment, which was refused.

THE ANGLO-CANADIAN MORTGAGE COMPANY V. COTTER ET AL.

Ejectment—Disclaimer—Possession—Defendants, striking out.

An application by defendants in an action of ejectment to have their names struck out on the ground that they were not in possession at or subsequent to the issue of the writ, and disclaim any interest in the land, is regularly made before appearance, although the application would be entertained after appearance where the justice of the case required it. But where two defendants applied after appearance to have their names struck out, and the Court, from the facts, entertained a doubt as to the good faith of these defendants, the application was dismissed, with costs.

[September 13, 1879.—Mr. Dalton, Q. C.]

This was an action of ejectment brought by the plaintiffs' company as mortgagees of the land in question, to recover possession from the defendants, who were the mortgagors. The defendants were three in number, Hugh Cotter, Mary Cotter, his wife, and F. L. Cotter, and all appeared to the writ. The land mortgaged was the property of Mrs. Cotter, who was married to her present husband in 1852. No notice of title was filed or served by any of the defendants. The appearance was not filed until the morn-

ing after the last day for appearance, which was the last day for serving notice of trial. The appearance was entered in the name of an attorney resident in a distant town, although a firm of attorneys in the same city in which the plaintiffs' attorneys resided had hitherto acted for the defendants in the same matter. The plaintiff had accordingly telegraphed his notice of trial, and used the utmost diligence to bring the case down to trial at the next Assizes. The defendants, Mary Cotter and F. L. Cotter, on the day previous to entering the appearance, obtained a summons to have their names struck out, on the ground that they were not in possession of the lands in question at or subsequent to the commencement of the suit. F. L. Cotter disclaimed all right or title to the land

Aylesworth shewed cause, and contended that the defendants were too late in making their application. The defence was plainly vexatious, no notice of title having been filed, and the present application was made by these two defendants for the purpose of avoiding the costs of the litigation, after doing all in their power to delay the plaintiffs. If they were not in possession at the commencement of the suit they should have moved to have their names struck out of the writ. He referred to *Harper v. Lowndes*, 15 U. C. R. 430.

Holman supported the summons. Mrs. Cotter was married in 1852, prior to the passing of the Married Woman's Property Acts, and the husband had been in possession of the land since 1864. It was not the separate property of the wife while they both lived, the husband still had his common law status. Had it been necessary for the Cotters to bring an action of ejectment to recover this land, the husband, Hugh Cotter, alone would have been the proper plaintiff: *Dingman v. Austin*, 33 U. C. R. 190; the husband having exclusive possession during the joint lives of himself and his wife: *Robertson v. Norris* 11 Q. B. 916; *Doe Eberis v. Montrueil*, 6 U. C. R. 515. The wife, under such circumstances residing with her hus-

band, could not be said to be in possession. The fact that an appearance was entered in the names of the two defendants who seek to be struck out, should not affect the application. The position of these two defendants is shortly this;—they are not in possession and they disclaim all interest, and, so far as they are concerned desire the suit to be stopped. There is no issue now to be tried between them and the plaintiffs. The practice hitherto has been to strike out the names of such parties, (*Hall v. Yuill*, 2 P. R. 242), and it is only equitable that this should be done.

MR. DALTON.—There has undoubtedly been a practice for many years to allow defendants in ejectionment, although they may be in the actual bodily occupation of the lands to have their names struck out of the proceedings, upon properly guarded terms as to their being bound by the judgment, &c. This practice has been adopted to avoid an injustice which was found to result from the working of the Ejectment Act, by which parties having no desire to resist the legal rights of those entitled, have been put to large costs in litigation in which they had really no interest, and desired to take no part. Regularly an application of such a nature should be made before appearance, and I can only say that what I see of the facts of this case, and of the conduct of the parties, is not calculated to induce me to step at all out of the ordinary course for their relief in this particular. I do not mean that the entering of an appearance should prevent the relief where justice requires it, but here it seems that all the defendants remain substantially in the same position as to title, and as to the actual occupation, that they were in when they mortgaged to the plaintiffs. I cannot help concluding that the object of all the defendants is to keep possession against the plaintiffs as long as possible, without expense, and that it is not in the interest of justice that I should grant this application.

I discharge the summons, with costs.

THORBURN V. BROWN.

Examination of parties—Order to re-examine.

A party having before judgment examined another party to the cause adverse in interest, under R. S. O. ch. 50, sec. 156, is not entitled to a re-examination of the same party except under the most special circumstances.

[September 16, 1879.—Mr. Dalton.]

An order to examine the defendant was taken out on June 23rd, 1879, and he was duly examined under such order as to his knowledge of the matters in question in the cause. In September following the plaintiff took out a summons for the re-examination of the defendant, on the ground that the previous examination had failed to elicit certain important facts from the latter, and that it would be unsafe for the plaintiff to go down to trial without such further examination having been made.

Aylesworth shewed cause on the return of the summons, and contended that there was no authority for granting the order required, and that it was the plaintiff's own fault if the previous examination had miscarried.

Rusk Harris supported the summons.

MR. DALTON refused to make the order, and discharged the summons, holding that a party is not entitled to a second order to examine, except under the most special circumstances, and to prevent a serious miscarriage of justice.

GANNON V. GIBB.

Arbitration—Reference—Facts in dispute.

Held, on an application to refer to arbitration an action on the common counts, that where a material question of fact was in dispute, the case was not a proper one in which to make an order for compulsory reference.

[September 17, 1879.—Mr. Dalton, Q.C.]

The plaintiff sued the defendant on a building contract for work done and materials provided in the construction of a certain building. The declaration contained the common counts. The defendant pleaded *never indebted, payment* and *set-off*. The defendant obtained a summons to refer the case to arbitration, upon the usual statutory affidavit.

Aylesworth, shewed cause, and produced an affidavit of the plaintiff stating that there were material questions of fact in dispute in the cause, as to the furnishing of part of the materials to be used in the building, and as to other matters set out in the affidavits. He contended that under *Clow v. Harper*, L. R. 3 Ex. Div. 198, this was not a proper case to refer to arbitration.

Watson, supported the summons.

MR. DALTON, held that where a material question of fact was to be determined in the suit, it would not be proper to refer such a case to the decision and award of an arbitrator. He followed the case cited, and discharged the summons.

FENWICK v. DONOHUE.

Judgment—Notice of trial—Assessment of damages.

Held, that in an action commenced by a writ not specially endorsed, where the defendant does not plead to the declaration, the plaintiff must sign interlocutory judgment against the defendant before he is in a position to serve notice of trial and assessment of damages.

[September 25, 1879.—Mr. Dalton, Q. C.]

The plaintiff sued the defendant under section 136 of the Insolvent Act of 1875, for fraud in purchasing goods upon credit at a time when the defendant well knew that he was insolvent. The declaration contained the common counts, followed by an averment of the fraud charged. The defendant did not employ an attorney, and no pleas were filed. The plaintiff served notice of trial and assessment of damages for the next Assizes, without having signed interlocutory judgment. The defendant obtained a summons to set aside the notice of trial and assessment, on the ground that judgment should have been signed before the notice was given.

Delamere shewed cause.

Marsh supported the summons, and argued that the present practice as to assessing damages in an action of tort, was, by the Common Law Procedure Act, substituted for the old practice of moving for a writ of enquiry, and, under that practice, interlocutory judgment had to be signed before the writ of enquiry could issue: *Russen v. Haywood*, 5 B. & Ald. 752; *Gordon v. Corbett*, 3 Smith, 179.

MR. DALTON.—Judgment not having been signed, there was nothing upon which the notice of trial and assessment of damages could be based. The notice must be set aside.

Summons made absolute.

MERCHANTS' BANK V. ROBINSON.

Pleading—Consideration—Equitable plea.

Declaration upon a promissory note. Third Plea—"That the defendant made the said note with and for the accommodation of one W. C., at the request of the plaintiffs, in respect of a pre-existing debt, then due to the plaintiffs, by the said W. C. alone, and the said note was drawn *payable on demand*, with interest at ten per cent., and except as aforesaid there was never any value or consideration for the making or payment of the said note by the defendant." Fourth Plea—On equitable grounds. That the defendant made the note jointly and severally with W. C. for his accommodation, and as his surety only, to secure a debt due to the plaintiffs, and that after the note became due the plaintiffs gave W. C. an extension of time for the payment of the note.

Held, that the third plea was good, for it shewed that no extension of time had been given, and therefore that there was no consideration; and that the fourth was not an equitable plea, and must be amended by striking out the words, "upon equitable grounds," and the jury notice served with it allowed to stand.

[October 3, 1879.—Mr. Dalton, Q.C.]

To a declaration upon a promissory note the defendant's third plea was; "that he made the said note jointly and severally with one William Cassidy for the accommodation of the said William Cassidy, at the request of the plaintiffs, in respect of a pre-existing debt then due to the plaintiff by the said William Cassidy alone, and the said note was drawn payable on demand, with interest at ten per cent.; and except as aforesaid there was never any value or consideration for the making or payment of the said note by the said defendant."

The fourth plea was in the following words: "And for a fourth plea to the said first count (the count upon the note) on equitable grounds, the defendant says that he made the said note jointly and severally with the said William Cassidy, for the accommodation of the said William Cassidy, and as his surety only, to secure a debt due to the plaintiffs from the said William Cassidy alone, of which the plaintiffs at the time of the making of the said note had notice, and except as aforesaid, there never was any value or consideration for the making or payment of the said note by the defendant; and after it became due

the plaintiffs while they were the holders of the said note, did, without the consent of the defendant, and for a good and sufficient consideration in that behalf, agree with the said William Cassidy to give him, and then accordingly gave him, time for the payment of the said note, beyond the time when the same was due and payable."

The plaintiffs obtained a summons to strike out the third plea as bad, and to set aside the jury notice served by the defendant for irregularity, in having been given while equitable issues were on the record.

Ogden shewed cause, and contended that the plea objected to was good. It shewed upon its face that the note sued upon being payable with interest on demand, no extension of time had been given to the principal debtor, to operate as a consideration for the making of the note. He cited in support of the plea, *Crofts v. Beale*, 11 C. B. 172; *Balfour v. Managers Fire and Life Ins. Co.*, 3 C. B. N. S. 300; *McGillivray v. Keefer*, 4 U. C. R. 456; *Fisken v. Meehan*, 40 U. C. R. 156.

J. F. Smith supported the summons.

MR. DALTON, after reserving judgment, allowed the third plea, holding that it was good on the authority of the above cases. As to the other part of the summons, he held that the fourth plea was not a plea upon equitable grounds, though stated so to be. He directed that this plea be amended by striking out the words "on equitable grounds," and that the jury notice be allowed to stand.

KING V. FARRELL,

Prohibition—Division Court—Cheque—Jurisdiction.

The defendant, who resided within the limits of the Tenth Division Court of the county of York, drew a cheque in the plaintiff's favour, within the limits of the First Division Court of the same county, upon a bank situate in the Tenth Division. The cheque having been dishonoured, the plaintiff sued upon it in the First Division Court. *Held*, that the action was improperly brought there, and that a summons for a prohibition thereto, on the ground of want of jurisdiction, must be made absolute.

[October 8, 1879.—*Osler, J.*]

The plaintiff sued the defendant upon a cheque drawn within the limits of the First Division Court of the county of York, and made payable at a bank situate within the limits of the Tenth Division Court of the same county. The defendant also resided within the limits of the Tenth Division Court. The cheque was dishonoured upon presentment, and the plaintiff entered the suit in the First Division Court. The defendant appeared at the trial, and objected that the Court had no jurisdiction, on the ground that the whole cause of action did not arise within that Division. The acting Judge held that the fact of the cheque having been drawn within the limits of the First Division Court was sufficient to give jurisdiction. Judgment was accordingly entered for the plaintiff. The defendant then obtained a summons for a prohibition on the ground of want of jurisdiction.

Ritchie showed cause.

Galbraith, supported the summons.

OSLER, J.—I regret to be compelled to give effect to this objection, inasmuch as it appears plainly that the defendant has no *bona fide* defence to the plaintiff's claim, and is defending only for time. The cheque was made in the First Division, and was payable at a bank situate within the Tenth Division. It operated as a payment until it

was presented and payment refused, and the plaintiff had to prove presentment and dishonour, in order to maintain this action. The whole cause of action, therefore, did not arise in either Division. "Cause of action has been held from the earliest times to mean every fact which is material to be proved in order to enable the plaintiff to succeed —every fact which the defendant would have a right to traverse." *Cook v. Gill*, L. R. 8 C. P. 107, per Brett, J. "Everything that is requisite to show the action to be maintainable, is part of the cause of action?" *Borthwick v. Walker*. 15 C. B. 501; *Watt v. Van Every*, 23 U. C. R. 196. All the cases are discussed in *Noxon v. Holmes*, 24 C. P. 541.

It is plain that the present case has been entered in the wrong Division Court, and the summons must be made absolute for a prohibition.

HAY v. DRAKE.

Sheriff's fees—Taxation—Revision.

Where a sheriff's fees have been taxed before a Deputy Clerk of the Crown under R. S. O. ch. 66, sec. 48, a revision of such taxation cannot take place before the principal Clerk of the Crown, but the Court may refer the bill back to the same Deputy Clerk for a revision of the taxation, where it appears that items have been improperly allowed.

[October 14, 1879.—*Osler, J.*]

This was an application to revise the taxation of the fees of the sheriff of the county of Waterloo, had before the deputy clerk of the Crown for that county, at the instance of the plaintiff, pursuant to R. S. O. ch. 66, sec. 48.

It appeared that an execution was placed in the sheriff's hands indorsed to levy on the defendant's goods, in all, \$327. The goods seemed to have been levied upon about seven miles from Berlin, the county town of Waterloo.

A claimant to the goods appeared, whose claim was subsequently barred on an interpleader application. They were then removed to Berlin and sold. The goods realized \$272.82, from which amount the sheriff deducted for his fees, poundage, and incidental expenses, \$164.14, of which \$78 was charged for possession money, and \$23.07 for mileage in going to seize the goods, going to and returning from possession, and putting up notices of sale and postponements. For the latter services there was a charge of \$12.75, besides \$2 for advertising, and in addition to the charge for possession money, a charge of \$2 for insurance. There were charges of \$16 for assistance at sales and removing goods, \$16.38 for poundage in the gross proceeds of the sale, \$8 for sixteen letters, and \$2 for an indemnity bond. The plaintiff complained that in obtaining the order barring the claim, the sheriff neglected to have the claimant fixed with payment of possession money caused by his claim, and that part of this charge was increased by the sheriff's own delay and default in serving the interpleader summons. The deputy clerk taxed \$8.49 off the bill, but no vouchers were returned or produced to show how the charges were justified, nor was any explanation offered by the sheriff.

Davidson, for the sheriff, shewed cause, and objected that there was no power to make the order as asked. The only manner in which a sheriff's bill can be revised is to appeal to the Court, or to a Judge of the Court in which the proceedings are taken, under R. S. O. ch. 66, sec. 52, or the matter must be referred back to the deputy clerk before whom the taxation was had.

Smellie, in support of the summons, contended that the words in section 52 of the Act referred to, "may appeal to the Court, or to a Judge of the Court in which the proceedings are taken, for a revision of such taxation, as in ordinary cases," meant that the revision of taxation could be had before the clerk of the Crown, as on taxation of costs in a cause.

OSLER, J.—The Act does not authorize the revision of the taxation in such a case as the present before the principal clerk of the Crown. The deputy is one of the officers specially named, the proceedings having taken place before him, and I cannot send the bill for revision to any other person. It is plain that the taxation which has taken place here ought to be reviewed. It is astounding to find that upon a small execution for \$327, where the goods seized produce no more than \$272, the sheriff's fees and charges should amount to \$164. In the absence of vouchers, I am unable to give special directions as to what allowance should be made in respect of each particular item. I am informed by the Master that several of them are improper. For example, mileage should be charged, according to the tariff, only on going to seize and sell, and not for returning; nor for putting up notices of sale or postponements. The charges for possession money and mileage are very large, and the deputy must not only see that vouchers are produced, but that the services were necessary, and that no part of the charge has been caused by any default or laches of the sheriff. \$1.25 per day of 24 hours is the proper and usual charge for possession, unless the circumstances are very unusual. Poundage should be charged only upon the amount actually paid over to the plaintiff. Affidavits, several of which are charged for, ought not to be allowed unless absolutely necessary, and it does not appear how they could possibly be necessary here. The same remark applies as to letters, which should only be allowed when required by the party or his attorney. The charge of \$2 for an indemnity bond does not appear to be allowed by the tariff. I have no doubt that the Master will afford the deputy any assistance he may require in revising this bill, if the foregoing directions should not be sufficiently full.

Order made accordingly for a revision of the taxation before the deputy clerk of the Crown at Berlin.

THE MERCHANTS' BANK V. PIERSON.

Examination of parties—Production of books—Attachment—Dismissal of action.

Where a party to be examined refuses to produce books, &c., as required by the notice to produce, served with the order to examine under R. S. O., ch. 50, sec. 161, or refuses or neglects to attend for examination, or refuses to be sworn or to answer lawful questions, pursuant to such order, proceedings against him by attachment must be taken before the *Court*, and not before a Judge in Chambers.

Semble, that the action could not be dismissed under R. S. O., ch. 50, sec. 170 a, 41 Vic. ch. 3, sec. 9, for disobedience by the plaintiff of the notice to produce.

Held, also, that the refusal to produce the plaintiffs' books, under the facts stated below, was not warranted.

[October 17, 1879.—*Osler, J.*]

Delamere obtained a summons calling upon the manager of the branch of the plaintiffs' bank at Belleville, to shew cause why a writ of attachment should not issue against him for contempt of Court, in refusing to answer lawful questions put to him by defendant's counsel while under examination on behalf of defendant, pursuant to an order made in the cause on September 15, 1879, by the Judge of the County Court of the county of Hastings, and for the non-production on said examination of the books of account of the plaintiffs in his custody and control, containing entries and memoranda relating to the matters in question in the action; and also why the action should not be dismissed for want of prosecution.

Aylesworth shewed cause, urging that the application should have been to the Court, instead of in Chambers.

Delamere supported the summons.

The point argued was, whether the manager of the branch of the plaintiffs' bank at Belleville ought to have produced the books of the bank in his custody, containing entries relating to the matters in question, the notice to produce referred to by sec. 161 of the C. L. P. Act, (R. S. O., ch. 50), having been served upon him. The manager refused to produce the books, stating that he was advised

to do so, not being authorized by the head office, and that they could not have been produced without great inconvenience, being in constant use at the bank, but that he was ready to produce copies of such parts of them as related to the matters in question. It did not appear that this offer was made at the examination. A certified copy of the examination was put in, but there was no report from the examiner.

OSLER, J.—I do not think that a refusal to comply with the order for examination has been made out, and I cannot therefore order the action to be dismissed under section 170 *a* of R. S. O., ch. 50, (41 Vic. ch. 8, sec. 9). The examinant has refused to comply with the notice to produce, and the remedy against him must be by attachment, under secs. 161 and 166. The former section provides, that the examinant shall, if so required by notice, produce at the examination all books, papers and documents, which he would be forced to produce on a subpoena *duces tecum*; and the latter, that every person taking examinations under the Act, may, and if need be shall make a special report to the *Court* in which such proceedings are pending, touching the examination, and the conduct or absence of any witness thereon, or *relating thereto*, and the *Court* shall institute such proceedings, and make such order upon such report, as justice may require, and as may be instituted and made in every case of contempt of the *Court*.

Section 162 provides that any party or person (*a*) refusing or neglecting to attend at the time and place appointed for his examination, or (*b*) refusing to be sworn or to answer any lawful question put to him, shall be deemed guilty of a contempt of *Court*, and proceedings may be forthwith had by attachment.

Section 163 relates to a demurrer to a question, a very different thing from merely refusing to answer it, and provides that the validity of the demurrer shall be decided by the *Court* or a Judge.

The only proceedings therefore, of those referred to in

these sections, which can be dealt with by a *Judge*, are those under sections 163 and 170 *a*. Proceeding by attachment under sections 162 and 166, must be taken according to the usual practice, before the *Court*: see *O'Donohoe v. Donovan*, 41 U. C. R. 591; and *Clark v. Allen*, 43 U. C. R. 242. The result is, that I cannot interfere.

I think, however, that I ought to express an opinion as to the merits, and I have no hesitation in saying that it is adverse to the plaintiffs. In the first place I am clear that the books which the manager was by the notice required to produce, were in their or his custody and control for the purpose of production without any reference to the head office. He would be bound to produce them at the trial under a *subpoena duces tecum*. That is not saying, as the plaintiffs seem to think, that the opposite party is at liberty to examine them, or to see any other part of them than that which is sworn to be all that relates to the matters in question; and in the next place I think it was the manager's duty to have produced these books upon the examination, or if that course would have been inconvenient to the business of the bank, then he should have prepared himself with such extracts and copies of the parts relating to the matters in question, as would have furnished the opposite party with the information he was entitled to as to their contents, and as would have enabled him to answer fully all questions relating to them. Litigants must act in a reasonable manner, and while on the one hand it is not probable that the Court would, for the purpose of an examination of this kind, enforce the actual production of the books themselves belonging to a bank or other large business, where it appeared that inconvenience would result from doing so, and that copies or extracts of the material parts were furnished, and there was no reason for supposing that such copies or extracts would not answer the purpose of the examination; yet, on the other hand, there is no special privilege attaching to banks, exempting them from compliance with rules to which other litigants are subject.

The summons must be discharged, but without costs

IN RE A. B. AND C. D., ATTORNEYS.

Attorney and client—Taxation of costs—Order to pay.

Where an order is made for taxation of an attorney's bill, as between attorney and client, under the R. S. O., ch. 140, sec. 49, a Common Law Court has no power here, as it has in England under the 6 & 7 Vic. ch. 73, sec. 43, to make a summary order for payment of the amount found due from the client, except by consent.

[October 17, 1879.—*Osler, J.*]

On the 23rd September, 1879, *Spragge* obtained a rule *nisi* calling upon John Cortland Secord and Alexander Oliver to shew cause why they should not pay to the attorneys the sum of \$156.72, the amount certified to be due to the attorneys, together with the costs of the application.

From the papers filed, it appeared that on the 29th August, 1879, an order was made in Chambers on the application of the attorneys referring their bills of costs rendered to Secord and Oliver, to the Master of this Court for taxation. The order provided "that the Master is to certify what is due to the said attorneys upon such taxation, and in the event of a less amount than one-sixth being taxed off the said bill, then the Master is to tax the applicants' costs of this matter and certify the amount of the same, and in the event of more than one-sixth being taxed off, then the Master is to tax the to said Alexander Oliver his costs of such taxation, and certify the same, and the said Master is to certify the balance due in favour of or against the said attorneys." The Master having proceeded with the taxation, on the 17th September, 1879, he made his report, finding that there was due to the attorneys the sum of \$156.72 in respect of the bills of costs and the costs of the taxation.

The affidavits and papers filed in Chambers on the application for the order to tax, were re-filed on the present application, and it appeared that the order to tax had been resisted by Oliver on the ground that he had never

retained the attorneys, and was not liable to them for the costs in question. It was admitted upon the argument, that it was understood that neither the order nor the taxation should fix the defendants with liability, that the question of retainer was not decided in Chambers, and that the reference was directed only for the purpose of ascertaining the amount.

Holman shewed cause, and filed further affidavits as to the retainer. He argued that the question of the retainer could not be decided upon this application, and that the attorneys must sue for their bills of costs in the usual way. He contended that there was no order or direction to pay any amount, and pointed out the distinction between section 43 of the Imperial Act (6 & 7 Vic. ch. 73) and the R. S. O. ch. 140, sec. 49. He cited *Re Pyne*, 5 C. B. 407; *Re Hair*, 7 Man. & Gr. 510; *Re Griffiths*, 16 M, & W. 809; *Re Woodhouse*, 2 C. B. 290; *Ex parte Lowless*, 5 D. & L. 793; *Neale v. Postlethwaite*, 4 P. & D. 623.

Spragge supported the rule. The direction to pay mentioned in the 49th section of our Act would be met by an order being made on the present application. In the Court of Chancery the practice is, to enforce payment by execution, of the costs found due by the Master's report.

OSLER, J.—The 49th section of the Act respecting attorneys, R. S. O. ch. 140, provides that “the certificate of the officer by whom the bill is taxed shall * * be final and conclusive as to the amount thereof, and payment of the amount certified to be due and *directed to be paid* may be enforced according to the practice of the Court in which the reference has been made.” The 43rd section of the English Act, which corresponds with our own, proceeds, “and in case such reference shall be made in any Court of Common Law, it shall be lawful for such Court or any Judge thereof to order judgment to be entered up for such amount with costs, *unless the retainer be disputed*, or to make such other order thereon as such Court or Judge shall deem proper.”

Formerly when a client applied for an order to tax his attorney's bill of costs; it was necessary for him to enter into an undertaking to pay what should be found due upon the taxation, and this undertaking was enforced when necessary by attachment. Neither under the English Act nor our own, is such an undertaking now given, but in England by force of the latter part of section 43 above quoted, payment of the amount of the bill when taxed, may be enforced in a summary manner by an order for judgment, or for payment of the amount, and execution upon the order. Apart from this section, it would not appear that the Common Law Courts have any summary jurisdiction in such matters. None has been conferred upon those Courts in this country by our statute. So far as they are concerned, the words "directed to be paid" can only have effect, where the client on obtaining the order for taxation consents to an order for payment of the amount, or where such a term is imposed as a condition of relief, when the taxation is not obtainable as of right.

The only object of an order for taxation under our statute, as far as I can understand it, is that the amount of the bill of costs may be ascertained, and this quite irrespective of the legal liability to pay it. If this is not admitted, as I think it is not, when the client applies for the order, *a fortiori* it cannot be so when the taxation takes place at the instance of the attorney, as in the present case. Then, if there is no admission of liability, where is the authority of the Court to try the question summarily on affidavit? I am referred to the practice of the Court of Chancery. But upon enquiry I find, that orders for taxation made in that Court contain a direction or order to pay what shall be found due, and it would seem that the order operates as an admission of the retainer by the client, or if taken out by the solicitor that the Master may enquire into and decide the question upon the taxation. The practice at law, however, has always been different, and the rule, which is a mere experiment, must be discharged with costs. See *Re Totten* 27 U. C. R.

449; *Re Green*, 7 P. Rep. 89; *In re Fitch*, 2 Chy. Ch. Rep. 288 (Spragge, V. C.); *In re Bacon*, 3 Ch. Ch. 79. (Mowat, V. C.)

Rule discharged, with costs.

* MERCHANTS' BANK V. PIERSON.

Dismissal of action—Stay of proceedings—Notice of trial—Examination.

A summons to dismiss an action for breach of an order to examine, generally implies a stay of proceedings; but where the Judge who granted the summons struck out the part relating to a stay, and the summons was afterwards enlarged without any mention of a stay, a notice of trial served while the summons was pending, was held to be regular.

[October 25, 1879.—Mr. Dalton, Q.C.]

This was an application by the defendants to set aside the notice of trial served by the plaintiffs, while a summons was pending to dismiss the action, for non-production of their books by the plaintiffs at an examination of the manager of their bank at Belleville. The summons, when presented to Osler, J., for signature, contained a stay of proceedings, which he refused to grant, and himself struck out. On the return of the summons an enlargement was granted, nothing having been said as to a stay of proceedings. The summons was subsequently discharged.

Delamere, in making the present application for the defendant, contended that the motion to dismiss implied a stay.

Aylesworth shewed cause, and argued that Osler, J., by striking out the clause relating to the stay in the summons, manifested his intention that there should be no such stay, and the summons having been openly enlarged, no stay could be implied.

* *Vide Supra*, p. 123.

MR. DALTON.—Though I cannot find any case exactly in point, I should on general principles have assumed that there was a stay of proceedings in this case, and would have acted on this assumption, but for the reason I give below. It is apparent to me that otherwise a wide-awake plaintiff may force the defendant down to trial, and practically refuse to allow his own previous examination, though the statute gives the defendant the right to examine the plaintiff, or in case of a corporation, the officer of the corporation. For shall it be, that while it is in discussion whether the plaintiff's cause shall be altogether dismissed, for default by the plaintiff in that which the defendant swears is essential to his defence, the plaintiff may force the defendant on in defiance of the statute?

Such would have been my views. I should have supposed the facts implied a stay, but that the learned Judge expressly refused to stay the proceedings, and the enlargement, silent on this point, could but continue a stay, either express or implied, which existed when the summons was returnable.

I discharge this summons, without costs; and I reserve the right of the defendant to move the Court against the verdict, if he shall think it necessary, just as though this motion had not been made.

WILSON V. THE AETNA LIFE ASSURANCE COMPANY.

Foreign Corporation—Service—Agent.

The defendants were a foreign insurance company, doing business in Ontario, and having a head office for this Province at Toronto. The writ of summons was served on the local agent of the defendants' company at Ottawa.

Held, that the service was good.

[October 22, 1879—Mr. Dalton, Q.C.]

The plaintiffs in this action were the administrators of Andrew Wilson, deceased, and the suit was brought to recover \$5,000 upon a policy of life insurance in the defendants' company. The defendants' head office is at Hartford in Connecticut, but they do business in Ontario and have an agency at Ottawa. The writ of summons was served at this agency on one Harman, who at the time of service admitted that he was the agent of the defendants' company. The defendants then took out a summons to set aside this service, on the ground that Harman had no interest in the suit—that he was not a properly authorized agent in that behalf, and that service should have been effected on the chief agent of the company at its head office for Canada in the city of Toronto, pursuant to Dominion Statute 40 Vic. ch. 42, sec. 9, *et passim*.

Harman's affidavit filed on the application, shewed that the requirements of the above statute had been complied with: that the defendants are a body corporate, incorporated elsewhere than within the Dominion of Canada, and licensed to do business here: that one W. H. Orr was duly appointed chief agent for Canada at Toronto. It also stated that the deponent acted as local agent of the defendants at Ottawa and was not authorized to receive process against said company under the provisions of the Act mentioned.

Ponton (Beaty, Hamilton & Cassels), shewed cause. He contended that the provisions as to service contained in the above statute were permissive only. Service under

such provisions would be good service no doubt, but it should not interfere with the plaintiffs' right to serve process in accordance with R. S. O. ch. 50, sec. 21, which is explicit as to service on corporations, where the head office is without the limits of Ontario. R. S. O. ch. 160, sec. 16 sub-sec. 2, seems to refer to this, and affirms the right to serve according to the Common Law Procedure Act. In any event the Dominion Statute does not over-ride the Ontario Act in questions of procedure. The provisions of the Insurance Statutes are for the protection of plaintiffs. The company has a right to sue in Canada, it transacts much business here, and the Legislature never contemplated lessening their liability to be sued by granting them special privileges. The test of agency must be; does the agent transact business for the company? Defendants cannot raise any distinction between *agent* and *local agent*. Their rules authorize agents to secure business, to receive money, to serve notices, &c., and this is sufficient to meet the requirements of the statute. This same question arose in the case of *Fortier v. Royal Insurance Co.*, (not reported), in which service upon an agent, not being the chief agent, was allowed, and subsequently affirmed on appeal by Armour, J. He referred to *Sheehey v. Professional Ins. Co.*, 3 C. B. N. S. 597; *Braham v. R. M. Steam Packet Co.*, L. R. 2 App. Cas. 381; *Newby v. Colt's Revolver Co.*, L. R. 7 Q. B. 293. The present application is merely for delay and should not be entertained.

Holman supported the summons, and contended that the service was bad, having been made on a mere local agent, invested with no responsible authority, and as such not being an agent within the meaning of the Act. The words "without the limits of Ontario," do not refer to foreign corporations aggregate. He cited *Taylor v. Grand Trunk R. W. Co.*, 4 P. R. 300, in which service on a station-master of the defendants' company was disallowed.

Mr. DALTON held that the service was good, and discharged the summons, with costs to the plaintiffs in any event of the cause.

MERCHANTS BANK V. BROOKER.

County Court — Issue directed to Superior Court — Fraudulent conveyance — Jurisdiction.

An issue had been directed from a County Court to one of the Superior Courts, under R. S. O. ch. 49, sec. 12, to try whether a conveyance of certain lands by a judgment debtor was fraudulent, and the County Court had defined the issue to be tried, and the time and place of trial. The plaintiff, in pursuance of the direction, prepared and delivered the issue to defendant, the grantee in the conveyance, who did not return it; and the plaintiff, after the time for trial had elapsed, applied in the Superior Court for an order absolute for sale of the land.

Held, such order could be made only in the County Court, whence the issue had been directed, and that the Superior Court could only try the issue, and could make no final disposition of the matter.

Held also, that the application was not in any event well founded, as the plaintiff shou'd have proceeded with the trial of the issue.

Quare, as to the granting of a new trial, or reviewing the verdict upon such an issue.

[October 27, 1879.—*Osler, J.*]

Norris moved for an order to sell the interest of the defendant in certain lands, of which it was alleged a fraudulent conveyance had been made by the judgment debtor to one Reneau. The case was in the County Court of the county of Essex, and the material facts relating to the alleged fraudulent conveyance being in dispute, and the value of the land or the debtor's interest appearing to be over \$400, the Judge of that Court had directed the trial of an issue in the Court of Queen's Bench. pursuant to section 12 of the Administration of Justice Act, R. S. O. ch. 49. The order provided that the judgment creditors should be the plaintiffs, and Reneau, the grantee in the alleged fraudulent conveyance, the defendant in the issue, and defined the question to be tried. It further provided that the issue should be prepared and delivered by the plaintiffs therein within ten days, and should be returned by the defendant within five days thereafter, and should be tried at the Fall Assizes for the county of Essex, to be held on the 27th October, 1879. The plaintiffs accordingly prepared and delivered the issue, but the defendant neglected to return it, and the plaintiffs assuming that

they were thereby prevented from proceeding with it, did not enter it for trial, and now moved for an order absolute for the sale of the land or the interest of the debtor in question.

OSLER, J.—I must refuse the order applied for. I think that I have no jurisdiction to make it. The 12th section of the Act referred to provides, that in the case mentioned the County Court or Judge shall “direct the trial of an issue in one of the Superior Courts, and may name the county in which the trial is to take place, subject to any order that the Superior Court or a Judge thereof may see fit to make in that behalf.”

The latter words do not appear to me to confer any authority on the Superior Court or Judge to make any final order in the matter of the issue, but rather, in the natural construction of the sentence, relate to matters incident to the trial, such as the time and place, or postponement thereof, &c.

The 14th section then provides that where in a summary way, or upon the trial of any issue, any land or the interest of any debtor is *found liable* to be sold, an order shall be made by the Court or Judge declaring what land or what interest therein is liable to be sold, which order is to be a sufficient warrant to the *proper* sheriff or other officer to sell, &c. The “Court or Judge” mentioned in this section is, in my opinion, the “Court or Judge” by whom the issue was directed. There is nothing to be done by such Court or Judge under the 14th section but to carry out the finding by making an order declaring what land or interest is liable to be sold, and there is nothing in either section which makes it necessary to give to the words “direct the trial of an issue” a wider meaning than they naturally bear.

The proceeding under which execution is to be obtained is retained in the County Court, and upon the trial of the issue can be carried out in that Court in just the same way as issues were formerly directed by the Court of Chancery

to be tried in a Court of law (and still may be in inter-pleader matters).

In other sections of the same Act it will be seen that the Legislature uses language apt and fitting to the occasion when it is intended that an "action or proceeding" shall be absolutely transferred from one Court to another : secs 21-23.

I also think that the application is in other respects not well founded. An order for sale can be only made upon the land being *found liable* to be sold. As at present advised, I see no reason why the plaintiffs should not have entered the issue for trial as directed by the order. The question to be tried was framed and settled by the order, and the fact that the defendant merely neglected to return the issue did not, in my opinion, prevent the plaintiffs from proceeding with the trial of it. I think that the only effect of not returning the issue was, that the defendant would be taken to be satisfied with the form of it, or, at the most, that the plaintiffs should have applied to the Judge to settle it. See *Arch. Prac.*, 12th ed., vol. i., p. 903—*Proceedings upon a feigned issue.*

It is worthy of notice that the Act makes no provision whatever for granting a new trial, or otherwise reviewing the verdict which may be given at the trial of the issue.

Order refused.

DENMARK v. McCONAGHY.

Examination—Fees—Stamps—Deputy Clerk of Crown.

Where an examination of parties pursuant to R. S. O. ch. 50, sec. 161, takes place before a Deputy Clerk of the Crown, though not designated in the order as acting in his official capacity, the fees for such examination are payable in stamps, and not in money.

[October 28, 1879.—*Osler, J.*]

This was an application on behalf of the plaintiff to revise a taxation of his bill of costs, by adding to it the charges of and incidental to the examination of the parties in the cause, and the costs of such orders.

The examinations in question were taken before a Deputy Clerk of the Crown, in his private capacity, and not as an officer of the Court, the addition, "Deputy Clerk of the Crown and Pleas," having been struck out by the County Court Judge when signing the order to examine, so that the examination might be held before the officer as a private examiner.

The fees for such examination were paid in money, not in stamps.

THE MASTER of the Common Pleas refused on the taxation to allow these fees.

H. J. Scott supported the summons.

Watson shewed cause.

OSLER, J.—It is the duty of the Deputy Clerk of the Crown as the officer of the Court to take the examination of the party under sec. 161 of the Common Law Procedure Act, R. S. O. ch. 50, when ordered to do so. He stands in this respect in a very different position from the Judge of the County Court accepting a reference to arbitration in a case where he is not a person named in the Act as one to whom a reference may be directed. For this reason I am of opinion that when the Deputy Clerk takes an examination, the fee should be paid in stamps.

I allow the plaintiff in this case to affix the proper stamps now, paying the penalty of ten cents for having omitted to do so at the proper time. I allow this to be done because the examination has been made use of as evidence in the cause, and is printed by the defendant as part of his case on appeal to the Supreme Court.

Upon the proceedings being stamped and the penalty paid, the taxation is to be revised by adding the charges connected with the order and examination.

The plaintiff must pay the defendant's costs of this application, to be deducted from the costs taxed in the cause.

HYDE v. CASMEA.

Similiter—Jury notice—Joinder.

The plaintiff joined issue upon defendant's pleas, and at the same time filed a *similiter*, without a jury notice, for the defendant. Afterwards the defendant filed a second *similiter*, and with it a jury notice. *Held*, that defendant should have filed a jury notice with his pleas; that the first *similiter* was good, that the second was unnecessary, and must, together with the jury notice, be struck out as bad.

[October 31, 1879.—Mr. Dalton, Q.C.]

The plaintiff in this case joined issue upon the defendant's pleas, and served notice of trial for the Chancery Sittings at Belleville. But fearing that the defendant would endeavour to prevent her from going down to trial at the Chancery Sittings, by filing a *similiter* and jury notice—under *Quebec Bank v. Gray*, 5 P. R. 31, and *McLaren v. McCuaig*, *supra* p. 54; the plaintiff filed a *similiter* for the defendant, without a jury notice. The defendant three days thereafter filed another *similiter*, and with it a jury notice.

Aylesworth, for the plaintiff, obtained a summons to set aside the second *similiter*, and the jury notice filed with it, on the ground of irregularity, on the facts already stated.

Watson now showed cause, and contended that the plaintiff's action in filing a *similiter* was for the purpose of depriving the defendant of his right to have a jury in the case. As such it was bad, and might be treated as a nullity.

MR. DALTON.—In *Quebec Bank v. Gray* the Chief Justice held that the defendant might file a *similiter*, and it was merely for the purpose of providing for his giving a jury notice, but was not necessary to the issue. Where the plaintiff's pleading is a mere negative to the defendant's the plaintiff can, by the practice of the Court, add a joinder for the defendant (See R. S. O., ch. 50, sec. 117). There can be only one *similiter*, and there is now nothing to which the defendant can annex a jury notice. If he wished to have a jury, he should have filed and served his jury notice when he put in his pleas. The summons must be made absolute to strike out the defendant's *similiter* and jury notice.

BROWN V. THE CORPORATION OF THE COUNTY OF YORK.

Pleading—Abatement—Bar—Jurisdiction—Venue.

The plaintiff brought his action for damages caused by the non-repair of a highway in the County of York, and laid the venue in Peel, but the declaration did not state in what county the highway was situate.

Defendant pleaded not guilty; and, 2—that the Court ought not to have further cognizance of the action, because the cause of action is local, and arose in the County of York and not in the County of Peel.

Held, that this was properly a defence *in bar*, and not *in abatement*. *Held*, that whether a plea *in abatement*, or *to the jurisdiction*, it could not be pleaded with a plea *in bar*.

The venue being admitted to be wrong, plaintiff was allowed to amend his declaration.

[November 5, 1879.—Mr. Dalton, Q.C.]

The plaintiff brought this action against the corporation of the county of York, to recover damages, alleged to have been caused to him by the non-repair of a certain highway leading to and adjoining a bridge at Islington. The venue was laid in Peel, and it was not stated in what county the highway in question was situate.

To the declaration, the defendant pleaded the following plea: “That this Court ought not to have further cognizance of this action, because the cause of action for which the plaintiff sues herein is local, and arose in the county of York, and not in the county of Peel where the venue is laid, or otherwise, or elsewhere, and this Court has cognizance of the said cause of action, only if laid in the said county of York, and not otherwise, or elsewhere, and this the defendants are ready to verify; wherefore they pray judgment, if the Court ought to have further cognizance of this action.” The defendants also pleaded *not guilty*, and that they were not the owners of the highway in question.

Watson, for the plaintiff, obtained a summons to strike out the plea above set forth, on the ground that it was a plea *in abatement*, and could not be pleaded along with pleas *in bar*.

Holman shewed cause. The venue is improperly laid The action being trespass on the case against the corporation, for neglect in the non-repair of a bridge, it is clearly a local action : *Ferguson v. Howick*, 25 U. C. R. 547. The plaintiff was wrong in laying the venue in Peel. The defendants could not demur, as the defect did not appear upon the face of the declaration, as was the case in *Irwin v. Bradford*, 22 C. P. 18. The Court could not take judicial notice of the location of "Islington Bridge," mentioned in the declaration. The only course open to the defendants was, to raise the defence by plea. Though in form a plea to the jurisdiction, it is substantially a plea in bar. The plea is similar in form to the one pleaded in *Dundalk v. Tapster*, 1 Q. B. 667. A plea shewing want of jurisdiction is a plea in bar, rather than a plea in abatement. A distinction is drawn between pleas to the jurisdiction, and pleas in abatement: *Chitty* on Pleading, 2nd ed., 457; *Bacon's Abr.* (2) 235; *Spooner v. Juddow*, 6 M. P. C. 257. The venue being improperly pleaded is a ground of nonsuit, if raised by the pleading: *Richardson v. Locklin*, 34 L. J. N. S. 225. Such a defence must be specially pleaded: *Richards v. Easto*, 15 M. & W. 244; *Ferguson v. Howick*, 25 U. C. R. 547; *King v. Johnson*, 6 East 583; *Barker v. Damer*, 1 Salk. 80.

Watson supported the summons.

MR. DALTON.—This plea is not strictly a plea in abatement, but a plea to the jurisdiction, which is no doubt something in the nature of a plea in abatement, and subject to many of the same rules. One rule that applies to both, is violated here. Neither a plea to the jurisdiction, nor a plea in abatement, can be pleaded with pleas in bar to the same cause of action. This does not require the citation of authority, for it is plain, and the reasons manifest.

Mr. Holman has cited to me the case of *Dundalk v. Tapster*, 1 Q. B. 667, where a plea pleaded to the jurisdiction was allowed to stand, though the matter of it shewed a bar, because it shewed an entire want of juris-

diction. This need not strike any one as a novelty, for there are many cases where a matter is a defence, either in abatement or in bar. In the case referred to, the plea set up want of jurisdiction, and there was want of jurisdiction so the Court regarded the form as of no consequence. Here, also, the plea is want of jurisdiction, but the difference is, that there is jurisdiction. The real defence here is not struck by the plea, the defence being that the venue is wrong, this action being local, and the cause of action being in York while the venue is laid in Peel.

My conclusion is, that this is a defence in bar, and under other circumstances I should allow the defendant so to shape his plea, upon proper terms as to costs. But as the plaintiff accedes to this view, and is satisfied that he can lay the venue in York only, the most proper order to make is, that the plaintiff have leave to amend his declaration without costs, and that the defendants' plea to the jurisdiction be struck out.

Order made accordingly.

CHANCERY CHAMBERS.

WARDELL v. TRENOUTH.

Lien of solicitor—Fund in Court recovered by suit.

A defendant's solicitor as a plaintiff's solicitor may have a lien for costs on a fund in Court.

A bill was filed by a purchaser against the vendor for rescission or specific performance of a contract for sale of lands in the county of Simcoe, made the 12th day of October, 1870, and registered in July, 1875, and by the decree made in October, 1876, the plaintiffs were ordered to pay certain overdue purchase money. C., a creditor of the defendants, having placed a *f. fa.* lands in the hands of the sheriff of Simcoe in December, 1878, obtained a stop order in January, 1879 against the purchase money in Court. The defendants' solicitor claimed a prior lien for costs of this suit, but had obtained no stop order :

Held, on the application of the defendants' solicitors for payment of the fund to them, that their lien had priority.

Part of the fund in Court was a balance of purchase money paid into Court by the plaintiff in March, 1879, pursuant to the decree on further directions made in October, 1878. C. seeking to attach this balance, in addition to his stop order obtained in January, 1877, placed a *f. fa.* goods in the hands of the sheriff of York in February, 1879 :—*Held*, that as to this balance the solicitors' lien had also priority.

[May 19th, 1879.—*The Referee.*]

This was a suit brought on 19th August, 1875, by purchasers for the rescission or specific performance of a contract for the sale of certain lands, made 12th October, 1870, and registered in the registry office of the county of Simcoe on 7th July, 1875. Four instalments only of the money out of ten had been paid at the time of filing the bill, and by the decree made in the suit on 2nd October, 1876, the plaintiffs were ordered to pay into Court the overdue instalments of their purchase money, and the other instalments and interest as they became due, according to the contract, and the contract was ordered to be

specifically performed with an abatement from the purchase money for certain deficiencies in the quantity and title of the land. Under this decree the plaintiffs paid into Court \$971.97. By the decree on further directions made on 16th October, 1878, the total amount of purchase money payable to defendant at that date was found to be \$1,225.60 after making the abatement; and one instalment of the purchase money, amounting to \$203.34, remained payable on the 12th October, 1879. The plaintiffs were, by the decree on further directions, ordered to be paid certain costs which amounted to \$514.39. These were deducted from the purchase money, leaving \$507.88 then overdue to the defendant under the contract. That sum was directed to remain in Court, and the rest of the money in Court was paid out to the plaintiffs. Subsequently on 5th March, 1879, the plaintiffs paid into Court \$178.85, the balance of the purchase money after deducting certain costs payable to them, and the defendant executed a conveyance which was at once registered by the plaintiffs.

On the 21st January, 1879, Edward Chamberlain claiming to be a creditor of defendant, obtained a stop order against payment of any moneys out of Court to the defendant.

On the 21st of April, 1879, the defendant's solicitors, claiming a lien on the money in Court, presented a petition for the discharge of this order and for payment to them of the money in Court on account of the costs of this suit.

On this motion the following additional facts appeared :
The money in Court amounted to \$726.

The costs still remaining due to defendant's solicitors amounted to \$822.75.

The respondent Chamberlain had two claims against defendant. The first was for \$44.39, costs of appeal from the Master's report in a suit for redemption, of *Trenouth v. Chamberlain*, and executions against goods and lands for these costs had been placed in the hands of the Sheriff of Simcoe on the 18th of December, 1878. The second claim was for \$2,038.86, payable to the respondent under

the Master's report in *Trenouth v. Chamberlain*, dated 19th February, 1878, and writs of executions against goods for this claim had been placed in the hands of the Sheriff of York with the intention of attaching the money in Court on 7th February, 1879.

T. Langton, for the petitioners. The solicitors have had a lien on the money in Court since October, 1876, when the decree ordered payment into Court. This lien is prior to all claims subsequent to the contract of sale, and the respondent by applying for a stop order could obtain no priority. He is presumed to have notice of a possible lien of the solicitor when he seeks to attach money recovered and paid into Court, in a suit: See *Haymes v. Cooper*, 33 Beav. 431; 12 W. R. 539; *Sympson v. Prothero*, 3 Jur. N. S. 711; *Morgan & Davey on Costs*, 397.

H. Cassels, for Chamberlain. The rule that a solicitor is entitled to a lien in funds recovered, can only apply to a plaintiff's solicitor. It is the plaintiff's solicitor who has recovered this fund. A defendant's solicitor cannot be said to recover a fund, and the defendant here, resisting specific performance, if he had succeeded would have recovered the land and not the money. The purchase money represents the land, and we have a lien against the land in the case of the \$44.39 claim by delivery of execution to the Sheriff of Simcoe, and against the purchase money by delivery of the execution to the Sheriff of York. The lien of a solicitor never interferes with the rights of the parties to the suit *inter se*: *Worrall v. Johnson*, 2 J. & W. 214, and here the plaintiff's right was to pay off encumbrances out of the purchase money. We might have required the plaintiff to pay to us the unpaid purchase money, and he ought to be in the same position where it has been paid into Court. We are clearly entitled to the \$178.85 paid into Court after our stop order, and to the costs of the stop order and of this application.

Langton, in reply. The rule as to solicitors' lien applies as well to a defendant as to a plaintiff's solicitor: *Towns-*

end v. Reade, 4 L. J. N. S. 233. In this case the fund is actually recovered by the defendant's solicitor because if the plaintiff's contention had prevailed the contract would have been rescinded and the defendant ordered to repay the purchase money already paid. There is no lien on the land, the contract of sale was made in 1870, and registered in 1875. Since that contract the defendant's interest has been only in the purchase money, and that interest could not be sold under the *fi. fa.* against lands delivered to the Sheriff of Simcoe. The rights of the parties to this application depend wholly upon the question which of them has the prior charge on the money in Court. The solicitor's lien dates from the decree in 1876, or at latest, from the decree on further directions in October 1878. The respondent has not a charge on this money by virtue of the writ delivered to the Sheriff of Simcoe, and his charge, if any, by virtue of his stop order, dates from 31st January, 1879, and by the delivery to the Sheriff of York from 7th February, 1879.

THE REFEREE held that the respondent had no lien on the land or the purchase money by the *fi. fa.* in the hands of the Sheriff of Simcoe: that the lien of the solicitors had priority as to the whole fund over all creditors of defendant subsequent to the contract of sale, and that if the plaintiff had paid any of the purchase money to the respondent he might have been compelled to pay it over again to the defendant: See *McPhatter v. Blue*, 15 C. L. J. 162.

GZOWSKI V. BEATY ET AL.

Deposit for sale—Who entitled to.

In a foreclosure suit the official assignee of an insolvent defendant paid \$150 into Court to procure a sale. The proceeds of the sale more than paid the plaintiff's claim in full, but were insufficient to pay the subsequent encumbrancers.

Held, that the deposit should be applied in reduction of the second mortgagee's claim.

[June 11, 1879.—*Blake, V.C.*]

This was a foreclosure suit. The official assignee of the defendant Beaty, the mortgagor, paid \$150 into Court to meet the expenses of a sale, and by consent of all parties the Court ordered a sale instead of foreclosure.

The proceeds derived from the sale were much more than sufficient to pay the plaintiff's claim in full, but not enough to pay the second mortgagees, the defendants the Imperial Bank.

After the sale, Mr. *J. H. Macdonald*, for the assignee, moved for payment out to him of the deposit, contending that the deposit was paid into Court as security to the plaintiffs only for the costs of the sale, and that as the proceeds of the sale had paid the plaintiff's claim in full, the estate of the defendant Beaty was entitled to the deposit.

Mr. *Bain*, for the defendants the Imperial Bank, contended that the deposit could only be paid to the assignee if the proceeds of the sale were sufficient to pay the subsequent encumbrancers.

Mr. *Creelman*, for the plaintiffs.

THE REFEREE ordered the deposit to be refunded to the official assignee.

This order was appealed and argued by the same counsel.

BLAKE, V. C.—Held, that the payment out of the deposit to the assignee would throw the costs of the sale on the subsequent encumbrancers, which would be improper, as

the subsequent encumbrancers had been in a position to pay off the plaintiffs and get foreclosure; that they had been deprived of this position by the order for sale, and notwithstanding their consent to that order, they ought not to be prejudiced; and that the deposit should go to the second mortgagees in reduction of their claim.

FISKEN V. INCE ET AL.

Revivor order—Discharge of—Practice.

An order of revivor was obtained in the cause on the ground that the sole plaintiff had assigned all his interest, &c., to one Close. The plaintiff applied to the Court by petition to set aside the order, disputing the assignment on the allegation of which the order was obtained.

PROUDFOOT, V. C., discharged the order of revivor, with costs.

[June 11th, 1879.—*Proudfoot, V. C.*]

In this suit an order of revivor was obtained on the 4th of April, 1879, which,—on the ground that since the making of the report of the Master, the plaintiff had assigned and conveyed all his estate and interest, &c., in the lands in question, and in the moneys secured by the plaintiff's mortgage to Alexander James Burrowes Close; and that the suit had thereby become abated,—ordered that the same do stand revived at the suit of A. J. B. Close, as plaintiff, against the defendant.

Mr. Fisken, the original plaintiff, appealed from this order, and the appeal came on in Court before Proudfoot, V. C.

Mr. J. H. Ferguson, for the appellant Fisken.

Mr. Bethune, and Mr. Moss, for the respondent Close.

PROUDFOOT, V. C.—The counsel for Close says that Fisken would not have been a party defendant to a bill of revivor under the former practice, and therefore that he cannot object to the order; that the Reg. Gen. 339 only permits objection to be made by one who has been served with the order, and who would have been a proper defendant under the former practice.

I think it very likely that he would not, in an ordinary case, have been a proper defendant formerly; but here the assignment is disputed; Fisken says it was in effect an escrow; that the condition has not been complied with, and so that he has not parted with his interest. It would be an intolerable abuse if a perfect stranger to a suit, or a person claiming under a disputed title, were to be at liberty upon a mere allegation of interest to oust the plaintiff from his suit, to substitute himself in his place, and to be able to say, your only remedy is to file a bill against me. Perhaps the terms of the Reg. Gen. do not cover such a case, but the general jurisdiction of the Court, to prevent its process and practice from being made an engine of fraud and oppression, is amply sufficient to warrant me in giving Fisken the right to make this application. If Close has such a right as he claims, which is denied, he may assert it in a proceeding for the purpose. I will not force Fisken to take the initiative, to lose the management and conduct of his suit, upon an unproved allegation of assignment.

In *Brignall v. Whitehead*, 30 Beavan, 229, the Master's report says it is essential that every order of course should be obtained on a true statement of the facts, and on an application to discharge it on that ground, it is impossible for the Court to go into a discussion of the merits, or the effect of the order made. How can it be said that the allegation of assignment here is a true statement when it is denied to be so by the assignor. Whether it be so or not, is a discussion on the merits, and it is said to be impossible to go into that on an application of this kind.

In *Jackson v. Ward*, 1 Giff. 80, it was stated by the Vice Chancellor Stuart, after consultation with the other judges,

that the *ex parte* order to revive is liable to be discharged by those against whom it is improperly obtained. The language there referred to the person in whose name the suit was revived, as having the right to object, but it is wide enough to include the case of any one against whom an order has been obtained, and surely no more adverse order could be got than removing a plaintiff from a suit, a sole plaintiff, and he must therefore have the right to object.

Close having by this procedure taken possession of another's standing, argues that the assignment being disputed, it is too grave a matter to be tried upon affidavits, and therefore that Fisken must bring a suit. It certainly will be a much more convenient mode of deciding such a matter to have the witnesses examined *viva voce*, and as Close is desirous of having it so tried, I will not assume the task, even if I have the power, of disposing of it upon affidavits.

I have read the evidence, the affidavits and examinations, of Close, Ince, and Fisken, and if nothing further be elicited at the hearing than is to be found in them, I think the judge who hears the cause will have no difficulty in disposing of it.

The order is discharged, with costs.

LONDON AND CANADIAN LOAN, &c., COMPANY V. PULFORD.

Trade fixtures as between mortgagor and mortgagee—Subsequent incumbrancers—Proper parties in Master's office.

Certain machinery was placed in a factory on the premises in question, some before and some after the execution of the mortgage to the plaintiffs in 1874. The mortgagor (the defendant) had no interest in any of the machinery at the date of the mortgage to the plaintiffs, having previously sold out to one Abel; but afterwards he became solely entitled to all of it, and he then executed a chattel mortgage of the same to the Parry Sound Lumber Company. On the reference under decree obtained by plaintiffs the Master made the lumber company parties as subsequent encumbrancers:

Held (assuming the machinery, or some portions of it, to be trade fixtures removable as between landlord and tenant,) that the machinery (or such portion aforesaid) when acquired by the mortgagor, would go to increase the plaintiffs' security; and that therefore the Master was right in making the lumber company parties as subsequent encumbrancers.

Further, that there appeared no good reason why the plaintiffs having purchased and taken an assignment of a mortgage made by defendant in 1869 were not entitled under that to have the greater part if not all the machinery added to their security.

[June 11th, 1879.—*Proudfoot, V. C.*]

Mr. Arnoldi, for the plaintiffs.

Mr. McCarthy, for Parry Sound Lumber Company.

The facts appear in the judgment.

PROUDFOOT, V. C.—This is an appeal from the order of the Master, making The Parry Sound Lumber Company parties as subsequent incumbrancers.

The mortgage to the plaintiffs was made on the 2nd of November, 1874, by the defendant Pulford, in pursuance of the short form of Mortgages Act.

Pulford was the owner of the land. Pulford and one Abel carried on a sash and blind factory upon the premises, and had placed a considerable quantity of machinery there for the purpose of carrying on the business. In June, 1872, Pulford sold out his interest in the machinery to George Grant, and on the 1st of July, 1872, made a lease of the sash and door factory for five years to Abel & Grant, who carried on the business in partnership till the death of Grant on the 11th of January, 1874, and Abel,

with the consent of Grant's executors, continued to carry it on under that style till the fall of 1876, when the executors sold Grant's interest to Abel, who continued the business alone till the 12th of May, 1877, when he sold a half interest in the business to Pulford, and made a bill of sale to him of an interest in all the machinery, stock and lumber on the premises. On the 26th of October, 1877, Pulford made a mortgage by bill of sale to the Parry Sound Lumber Company, of the undivided half of all the machinery, &c., to secure \$15,000, which was registered under the Bill of Sales Act on the 29th of October, 1877, and renewed on the 17th of October, 1878.

A considerable quantity of valuable machinery was put in the premises after the date of the plaintiff's mortgage, moulding machine, 19th September, 1876, the door and blind clamp in July, 1875, Others were placed there before the plaintiff's mortgage, a moulding machine on the 3rd of September, 1874, a union planer on the 1st of December, 1873, the boiler in November, 1873.

The machines are fastened with bolts and screws. The boiler was built in. Some witnesses are produced, who say they consider the machinery, save the boiler and engine, could be removed without injury to the building. The boiler could be taken away without material injury to the building. I shall not examine minutely the evidence as to the mode in which the machinery is attached to the building, but will assume that it all constituted trade fixtures, and removable as between landlord and tenant. Some of these are clearly fixed to the soil, and if any are so, the Master's order was right.

The lumber company contend that however attached it must be considered as severed and forming personal estate from the mode of dealing by the parties: that it formed the stock of the partnership: that Pulford sold his interest in it to Grant in 1872: that he bought back an interest in it in 1877: and that he has mortgaged it to the lumber company. The acts done by Pulford after November, 1874, cannot have any effect on the plaintiffs' security.

I ought to have mentioned that Pulford had made a mortgage to one McKay in July, 1869, and that during the progress of the reference in this suit, the plaintiffs purchased and procured an assignment of it, and have proved their claim under it.

I was referred to *Trappes v. Harter*, 2 C. & M. 153, and to *Waterfall v. Penistone*, 6 E. & B. 876, as establishing the position of the lumber company, and perhaps if those cases were to be relied on they would do so; but on this point they have been overruled.

Climie v. Wood, L. R. 3 Ex. 257, approved on appeal, L. R. 4 Exch. 328, establishes that fixtures placed upon land by the mortgagor, of a kind that would have been removable as between landlord and tenant, belong to the mortgagee. The jury found in that case that the engine and boiler were fixed by the mortgagor for their better use, and not to improve the inheritance, and that they could be removed without any appreciable damage to the freehold, but the Court held that immaterial, for the right of the mortgagee attaches by reason of the annexation to the land, the intention of the mortgagor cannot prevail against the legal effect of the deed. In that case the machinery was fixed by the mortgagor alone.

In *Cullwick v. Swindell*, L. R. 3 Eq. 249, however, the fixtures were attached after the mortgage by the mortgagor and his partner, for the purpose of their trade; but it was held that they passed to the mortgagee. This followed the decision of *Ex parte Cotton*, 2 M. D. & D. 725, where a trader had mortgaged his trade premises in fee, and then entered into partnership, and the firm carried on business on the same premises, and after the mortgage they erected trade fixtures, which were held to belong to the mortgagee, and not to the assignee in bankruptcy.

Trappes v. Harter, 2 C. & M. 153, and *Waterfall v. Penistone*, 6 E. & B. 876, were cited and examined, and *Walmsley v. Milne*, 7 C. B. N. S. 115, referred to, in which Mr. Justice Williams expressed his opinion that so far as regards the right to fixtures having been decided to

pass to the assignee in preference to the mortgagee, the cases of *Trappes v. Harter*, and *Waterfall v. Penistone*, had been overruled.

This disposes of the objection that the fixtures were attached by the mortgagor and his partner.

Prior to the mortgage to the plaintiff's, however, Pulford had assigned his interest in the business and the machinery, &c., to Grant, and Abel and Grant put up additional machinery, after the mortgage as well as before it, while holding under a lease from Pulford. I have assumed that the machinery and fixtures were removable, as between landlord and tenant, and if the matter rested there, Abel and Grant might, I presume, have removed the machinery placed by them as against the mortgagee of their landlord; but subsequently the mortgagor procures a conveyance of an undivided interest in the machinery, which would inure to the benefit of the mortgagee, and the same consequences would result from the acquisition of this interest as if the machinery were then for the first time, so far as Pulford at least is concerned, attached to the freehold.

But however that may be, and I confess to having great difficulty in coming to a conclusion satisfactory to myself upon the subject, there does not seem to me any good reason why the plaintiffs may not rely upon their position as assignees of McKay's mortgage, a mortgage made before the greater part of, if not all, the machinery was placed upon the premises, before there was any dealing with it by Pulford to indicate an intention to treat it as chattel property, and before any lease made of it by him. In that character they are entitled to treat everything attached to the freehold by the owner or by the owner's partner, or by any lessee from him as an addition to their security. That some of it was so fixed there can be no doubt, and, if any were, it is sufficient to support the order.

Besides, when a tenant suffers a lease to expire without removing the fixtures, he will be deemed to have made a gift of them to the landlord; and so complete would be the title thus acquired that a subsequent severance of them

would not have saved the right: *Amos v. Ferard*, Fix. 95; *Lyde v. Russell*, 1 B. & Ad. 394; *Elwes v. Mawe*, 2 Sm. L. C. 6th ed. 153, 180, 7th ed. 162, 8th ed. 169.

Here the lease expired on the 1st of July, 1877, and previous to that on the 21st June, 1877, Abel became insolvent. None of the fixtures were removed during the term, all remain on the premises yet. Pulford, therefore, became solely entitled to the whole of the fixtures at the end of the term, and so far at all events as concerns those attached to the freehold, they would go to increase the plaintiff's security. The mortgage to the lumber company was not made till the 26th October, 1877.

I dismiss the appeal, with costs.

WILSON v. CAMPBELL.

Proviso in mortgage—Interest.

A mortgage was to be void on payment of \$2000, at eight per cent., in five years from date thereof, with "interest in meantime half-yearly on, &c., in each and every year of said term of five years; and also upon payment of interest at and after the rate aforesaid upon all such interest money as shall be permitted or suffered to be in arrear and unpaid after any of those days and times hereinbefore limited and appointed for payment thereof."

Held, that the contract between the parties was simply one for the payment of interest on any interest which might be in arrear before, but not after, the expiry of mortgage.

[October 13th, 1879.—*Blake, V. C.*]

This was a mortgage suit, and there being subsequent encumbrances a reference was directed to a Master.

The mortgage contained the following proviso for repayment: "Provided this mortgage to be void on payment of the sum of \$2,000 (in gold) of lawful money of Canada, together with interest thereon at the rate of 8 per cent. per annum, as follows: The said principal sum of \$2,000 at the expiration of five years from the date hereof (viz., April 16, 1877), and the interest thereon at said rate in the

meantime half-yearly on the sixteenth days of the months of October and April, in each and every year of said term of five years, the first payment of interest to be made on the sixteenth day of October next (1872), and also upon payment of interest at and after the rate aforesaid upon all such interest money as shall be permitted or suffered to be in arrear and unpaid after any of those days and times hereinbefore limited and appointed for payment thereof."

The second mortgagee appealed from the Master's report on two grounds, viz.: 1. Because the Master, in taking the plaintiffs' account, allowed them compound interest upon interest in arrear with rests, instead of allowing simple interest upon the interest in arrear; 2. Because the Master allowed to the plaintiffs interest upon interest subsequent to the time when the principal money secured by their mortgage fell due.

Mr. *T. Langton*, for the appellant, contended that as no times were appointed for payment of interest after April 16th, 1877, no interest could be said to be payable half-yearly, and overdue and in arrear, each half-year after this date, the interest merely accruing from day to day. For this reason he argued that interest could not be claimed upon any interest accruing after the time appointed for the payment of the principal.

Mr. *J. C. Hamilton*, for the plaintiffs, respondents, contra.

BLAKE, V. C., allowed the appeal upon both grounds, holding that the contract between the parties for payment of interest upon interest in arrear was limited to the instalments, for the payment of which dates were fixed in the mortgage. He therefore allowed simple interest on such instalments from the time they respectively fell due, but not on any interest accruing after the time when the mortgage fell due. Report ordered to be amended accordingly, with costs to the appellant.

CLARK V. CLARK ET AL.

Partition—Lands in different counties—G. O. 641—Costs—G. O. 643.

After an order for partition of lands in the county of Peel had been granted by a Master under G. O. 641, an order was made by a Judge in Chambers to include in said order lands in another county, though such lands were known of at the time the partition order was made. The costs of the application were allowed, exclusive of the usual commission under G. O. 643.

In this suit an order for partition of lands in the county of Peel had been made by the Master at Brampton, under General Order 640.

Mr. *Fleming* now moved, under General Order 641, for the sale or partition, under said order of the Master, of certain lands in the county of Grey. It appeared that the Grey lands were not discovered after the granting of the order by the Master, but were known at the time of the making thereof.

Mr. *Plumb*, for the infants.

SPRAGGE, C., held that the case was within the scope and intention of Order 641, notwithstanding the use of the words: "When, after an order has been made, lands are discovered in another county," &c.

Held, also, that the case was a proper one for the exercise of the discretion of the Court or Judge, reserved under Order 643, and costs of the application were allowed, exclusive of the commission fixed by the Order.

JACKSON V. HAMMOND ET AL.

Mechanics Lien Acts—Parties to suit—Costs—Practice.

A mortgagee filed a bill for sale, making certain lien-holders under the Act parties defendants therein, alleging that the work by virtue of which their liens arose was commenced after the registration of his mortgage. Held, that the lien-holders should have been made parties in the Master's office ; and plaintiff's costs of making them defendants by bill were disallowed on revision of taxation.

[October, 1879.—*The Taxing Officer.*]

The plaintiff, Jackson, was mortgagee of the lands in question, the defendant Hammond and the other defendants being the holders of liens, registered under the Mechanics Lien Act against the premises.

The bill was an ordinary bill for sale under a mortgage but contained the following allegations as to the lien-holders : “The defendants John Anderson et al., have lately filed in the Registry office in and for the county of Huron statements of their respective claims of liens, to which they claim to be entitled under ‘The Mechanics Lien Act,’ by virtue of doing work upon and furnishing material in the erection of a certain house upon the said lands.

The said mortgage to the plaintiff was executed and duly registered in the Registry office in and for the county of Huron, before the commencement of the work done, or the placing of the materials aforesaid upon the said lands, in respect whereof the defendants, John Anderson et al., claim such liens as aforesaid.”

Mr. THOM, *Taxing Officer*, held on revision of taxation of plaintiff's costs, that the lien-holders should not have been made parties by bill, but should have been added as parties in the Master's office, after decree, by notice ; and costs of making them parties by bill were accordingly disallowed.

This ruling was subsequently approved of by BLAKE, V. C., and PROUDFOOT, V. C.

BIGGAR V. WAY.

Abatement—Time—Practice.

This suit became abated between the date of the report and the time fixed by it for payment by subsequent encumbrancers. On an application for a final order for foreclosure, it was refused, and a new day was appointed, allowing the encumbrancers an additional time for payment, equal to the time the suit remained abated.

[October 27, 1879.—*Blake, V. C.*]

In this case the Master's report, made in March, 1879, fixed the 17th of September following for Austin and Hiltin two subsequent encumbrancers to redeem. The sole plaintiff died on the 24th of May, 1879. An order of revivor was obtained on the 24th of June, 1879, and served on the 1st of September, 1879.

Mr. *Miller* now moved on appeal, by consent, from the order of the Referee appointing a new day for payment, allowing Austin and Hiltin an additional length of time to redeem, equal to the time that the suit remained abated, viz., from the 25th of May to fourteen days after the service of order of revivor.

Mr. *Spencer* contra.

BLAKE, V. C., considered that the practice of allowing such time on abatement was well settled, and dismissed the appeal, with costs.

CONNOLLY V. O'REILLY.

Costs on appeal—Sum in gross in lieu of—Practice.

An order allowing \$400 to be paid into court by the appellant in lieu of a bond will be granted *ex parte*.

[November 15, 1879.—*The Referee.*]

In this case Mr. *Hoyles*, for appellant moved *ex parte* for leave to pay \$400 into Court as security for the costs of appeal.

THE REFEREE made the order.

CAMPBELL V. CAMPBELL.

Commission and disbursements under G. O. 640, 643—Discretion of Master—Appeal—Revision of disbursements.

Where a Master in his discretion fixes the commission to be allowed to parties under G. O. 643, and settles the disbursements in the suit, there is an appeal to a Judge in Chambers from his finding. The disbursements should still be submitted to the Master in Ordinary for revision like other bills of cost.

[, 1879.—*Blake, V. C.*]

This was a partition suit under G. O. 641. The property sold for \$2,400. The plaintiff was entitled to six-eighths of the net proceeds, and two infants to one-eighth each. The total commission amounted to \$199.15, which the Master divided in the following proportions, viz.:—Seven-eighths to the plaintiff, and one-eighth to the guardian. The Master also fixed the disbursements, which were not revised.

The guardian for the infants appealed from the order of the Master on the following grounds: 1. That one-eighth of the total commission was too little compensation. 2. That the disbursements ought to be revised.

Mr. *Hoskin*, Q. C., for appellant.

Mr. *Hoyles*, for the plaintiff, contended that under G. O. 643 the division of the commission among the solicitors of the different parties was entirely in the discretion of the Master; and that, under G. O. 640 and 643 as only actual disbursements were allowed, no revision was necessary.

BLAKE, V. C., allowed the appeal on both grounds, holding that a Judge in Chambers might properly review the distribution of compensation made by a Master: that the question as to what are or are not disbursements is a very difficult one, and these bills should still be referred as ordinary ones to the Master in ordinary for revision.

RE HOPKINS—BARNES v. HOPKINS.

Dower—O. S. 42 Vic. ch. 22.

H. being possessed of some lands executed mortgages of them. Some of which were given to secure unpaid purchase money, and others to secure the repayment of money lent to H. The wife of the mortgagor had joined in the mortgages to bar dower.

H. having died intestate:

Held, on sale of the lands under decree, directing a sum in gross, in lieu of dower, to be paid to the widow, that she was entitled to dower out of the whole amount realized from the sale, after deducting therefrom the amount of the mortgages given by H. to secure unpaid purchase money, but not of the other mortgages.

[December 15, 1879.—*Blake*, V. C.]

This was a suit brought for the administration of the estate of George Hopkins, who died intestate, in October, 1878, leaving the defendant, Sarah S. Hopkins, his widow. The intestate was possessed of considerable real estate, all of which was subject to mortgages at the time of his death. The widow had joined in these mortgages to bar

her dower. It appeared that some were given to secure unpaid purchase money, but the remainder to secure moneys borrowed by and for the sole use of the intestate.

On the 4th March, 1879, a decree on further directions was made, by which the Master at Whitby was directed to allow the widow a sum in gross in lieu of her dower, which was directed to be paid out of the purchase money.

The proceeds of the sale of the real estate, after deducting the mortgages so given for purchase money, amounted to about \$19,000; but after deducting the amount of the other mortgages there only remained about \$7,000. The Master allowed the widow dower out of the \$19,000.

The plaintiff appealed from the report, on the ground that the Master should only have allowed dower out of the \$7,000.

J. H. Macdonald, for plaintiff, contended that the effect of sections 1 and 2 of O. S., 42 Vic., ch. 22, was only to give the widow dower in the equity of redemption, and that she could only claim that her dower should be computed upon the proceeds of the sale of the equity of redemption, and that the subsequent clauses of the Act must be read in accordance with this view.

Alfred Hoskin, for defendant. The Act is not retrospective and does not apply to this case. This case is governed by the rule laid down in *Re Robertson*, 24 Grant 442, and *Robertson v. Robertson*, 25 Grant 276, 486. Sections 1 and 2 of the Act do not refer to cases of lands sold in an administration suit. They are governed by section 5, and sub-sections. These latter sections do not change the law as laid down in *Robertson v. Robertson*, and the same rule as laid down there will still govern the Court.

BLAKE, V. C.—I think that under the statutes the Master was correct, and therefore that the appeal should be dismissed, with costs.

IMPERIAL LOAN AND INVESTMENT COMPANY V. O'SULLIVAN.

Subsequent incumbrancer—Priority.

There were two mortgages registered against property, the first mortgagees were pressing the mortgagor for payment, and about to sell out his chattels, and A. at the request of the mortgagor, and to stop such sale, advanced \$1,000 to them, and took a mortgage to secure himself from the mortgagor, but with no understanding with the first encumbrancers.

Held, that A., though he thus reduced the first mortgage by \$1,000, and so bettered the position of the second mortgagee by that amount, could not claim priority for his advance over the second mortgagee.

In August, 1875, William Kelly mortgaged certain leasehold property in Toronto to the plaintiffs for a very large sum of money. Subsequently to this Kelly gave a mortgage to Mr. Crombie, which was duly registered. Afterwards, in August, 1876, the plaintiffs pressed Kelly for payment, and were selling out the furniture on the premises, and it being represented to the Rev. Mr. Conway that on a payment of \$1,000 being made to the plaintiffs on the mortgage debt the sale would be stopped, a cheque for \$1,000 was drawn, payable to plaintiffs' order, by the Rev. Mr. Conway, and handed to plaintiffs, used by them, and credited to Kelly. A mortgage of even date with the cheque was given by Kelly to the Rev. Mr. Conway, securing repayment of this \$1,000, and registered subsequently to Mr. Crombie's mortgage. It was admitted on one side in the argument that the cheque was given at the request of Kelly, and on the other that it reduced plaintiffs' mortgage by \$1,000. There was no understanding with the plaintiffs that it was to be part of their mortgage debt. They did nothing beyond appropriating the money to themselves, giving credit therefor to Kelly. The Rev. Mr. Conway held no mortgage except the \$1,000 one, and had no interest in premises beyond a desire to save the property to the mortgagor.

On the reference under decree, Mr. O'Sullivan contended, that the \$1,000 cheque advanced to the plaintiffs by a party other than the mortgagor, and reducing their mortgage by that sum, entitled the party so advancing to rank next to the plaintiffs for that amount.

Mr. Worrell, contra.

THE MASTER.—The claim now made on behalf of the Rev. Mr. Conway cannot be sustained; none of the cases cited are at all in point. *Hill v. Brown*, 6 Ir. Eq. 403, was a case where a tenant for life of a leasehold property, and liable to pay the rent to the landlord, neglected to do so; a mortgagee who did pay it was held entitled to claim the amount so paid against the persons entitled in remainder. The question mainly discussed in that case seems to have been whether the mortgagee had been guilty of such negligence in permitting the tenant for life to receive the rents, without paying the claims of the head landlord, as to deprive him of the right to claim against the inheritance the amount he had to pay. In *Featherstone v. Mitchell*, 11 Ir. Eq. 35, the conusor of a Judge who paid head-rent to the landlord to save all the parties interested from eviction, was held entitled to priority to the extent of what he had so paid over prior incumbrancers. The case of *Locke v. Evans*, 11 Ir. Eq., 52, was one where a sub-tenant having paid rent to the head landlord was in like manner held to have priority for the amount paid. The passages in *Coote* and *Fisher*, to which I was referred, deal simply with cases of a similar kind, or with cases of priority of bottomry bonds over incumbrances upon ships. The only case I could observe cited in these writers which would in any way seem to favour the claimants' contention is *McKenzie v. Gordon*, 6 Cl. & F. 875. But there the subsequent mortgagee who advanced money to pay off the first had it assigned to himself as collateral, and so became entitled to recover upon it in priority to a mesne incumbrancer.

Had the claimant been prior to the 17th of August, 1876, a mortgagee of the property in question, and then finding that the first mortgagees were forcing a sale so that the property was being sacrificed, and thereby he and Crombie were both in danger of losing their security, and had he then advanced an additional sum to save the security from being lost to them, there might have been some ground, perhaps, for his contention. But there was nothing of the kind here. On the 17th day of August the claimant was

a perfect stranger to the property. Kelly had made two mortgages upon it, and then when the first mortgagees were enforcing their security he made a third to the claimant, who advanced upon the security of that mortgage \$1,000, which was paid over to the first mortgagees on account of their claim. How he could thereby acquire any priority over Crombie, the second mortgagee, I fail to discover. There was no such case of salvage as was contended for. That the claimant made the cheque for the \$1,000 which he lent to Kelly, payable to the plaintiffs, and that the cheque itself was handed over to them, can make no difference.

The affidavit of the claimant is worded as if the money had been advanced to the plaintiffs, but it was not so, it was advanced to Kelly, though paid over by him to them. The plaintiffs never asked the claimant to advance them any money, and they received it as a payment by Kelly. The mortgage itself is expressed to be in consideration of \$1,000 paid to the mortgagor, and the receipt endorsed is signed by Kelly and acknowledges \$1,000 to have been paid to him. The covenant by the mortgagor for right to convey is that he has the right to convey subject to the prior mortgage to the company, the plaintiffs.

This decision was appealed from and the appeal came on before Spragge, C.

Mr. *O'Sullivan* for the appellant.

The plaintiffs in this case are first incumbrancers, Mr. Crombie second in point of time and in point of registry. When Mr. Crombie took his mortgage there was a large amount due and payable from the mortgagor to the first mortgagees before he could be paid anything. His mortgage was worth nothing till the estate realized at least \$15,000. Every dollar by which this sum was reduced enured to the benefit of Mr. Crombie, and so far as the mortgagor reduced it there is no doubt but he was legally entitled to such benefit. It is admitted here that by the cheque of \$1,000 paid to plaintiffs by Rev. Mr. Conway the mortgage was reduced by that amount, and Mr.

Crombie's position was bettered to that sum. The case of *McKenzie v. Gordon*, cited, is that of money advanced by a puisne incumbrancer, but any one who lends at the instance of an interested person will be entitled to the benefit of it. Fisher on Mortgages, 2nd vol. 620. A puisne encumbrancer could only rank for the *advance*, and that is all that is claimed here. He could not rank at all without taking a mortgage, and it is apprehended this *locus standi* is not material in the consideration of the principle involved. The appellant is not a mere volunteer, and if he paid off the whole of the first mortgage he ought in equity to be subrogated to these positions—if he paid off a one-fifteenth he ought on principle to get the benefit, of the \$15,000 ahead of Mr. Crombie, when he took his mortgage. The plaintiffs now rank for \$14,000 and the appellant should, and without any injury to the respondent's position when he took his mortgage, rank for the other \$1,000 as part of their mortgage debt.

Worrell, contra.

SPRAGGE, C.—The question is one of priority between the defendant Crombie and the defendant the Rev. Patrick Conway. The claim of the latter to rank in priority to the defendant Crombie rests only upon this, that the sum advanced by him, and for securing which the mortgage of Kelly was given, was paid directly by Mr. Conway to the plaintiffs, the first mortgagees, at the instance of Kelly to relieve his chattels from a threatened sale by the plaintiffs for arrears due on their mortgage, and that the plaintiffs' mortgage was thereby reduced *pro tanto*. Mr. Conway upon this claims to be subrogated *pro tanto* to the position of the first mortgagees.

I do not find in any of the cases to which I am referred, nor in any that I have seen, authority for the position. I think that the Master was correct in placing Mr. Conway after Mr. Crombie, the second mortgagee in order of priority, and that in his judgment, which has been put in, he has placed his position upon the true ground.

The appeal is therefore disallowed, with costs.

STEPHENSON v. BAIN.*

Contract of sale—Loss after execution of.

A purchaser at a sale under decree signed the usual contract to purchase and paid the deposit. The next day the buildings on the property were burned down.

Held, that the loss must fall on the purchaser, as the interest contracted for passed to him on the signing of the contract.

[November 28, 1879.—*The Referee.*]

Lands were sold under decree for partition or sale in the cause. The purchaser signed the usual contract on the day of sale to purchase the property at \$1,500. The day after the sale the hotel buildings, of which the property was composed, were burned down. The report on sale was made and confirmed. The land without the building, was worth about \$300. The purchaser had paid his deposit on day of sale, and this application was to compel payment into Court of the balance of purchase money.

Mr. Hoyles, for the plaintiff, contended that the English cases in point did not apply, because here an absolute agreement to purchase is entered into, whereas in England only a bidding paper is signed.—See *Daniel on Chy. Prac.* p. 1161, and *Daniel's Forms*, p. 1328 and G. O. 384: that the English authorities opposed to the plaintiff's contention are *Ex parte Minor*, 11 Ves. 559, and *Twig v. Fifield*, 13 Ves. 518, and these have been practically overruled by the cases of *Anson v. Towgood*, 1 Jacobs & Walker 637, and *Vesey v. Ellwood*, 3 Drury & Warren 77; see also *Fry on Spec. Perfor.* p. 264, and *Brady v. Keenan*, 6 P. R. 262.

Mr. Plumb, for infants.

Mr. R. M. Fleming, for the purchaser, relied on *Ex parte Minor* and *Twig v. Fifield*, above quoted.

* In Appeal.

THE REFEREE held that the interest contracted for passed to the purchaser on the signing of the agreement to purchase ; and that the cases of *Twig v. Fiefield*, and *Ex parte Minor* were overruled by the later cases.

Usual order made for balance of purchase money to be paid into Court.

COOK v. CREDIT VALLEY RAILWAY CO.

Sequestration—Motion for—Length of notice.

On moving for a writ of sequestration for a breach of an injunction, two clear days' notice of motion is sufficient.

[16th December, 1879.—*Blake, V.C.*]

In this case an injunction had been granted on behalf of the plaintiff, restraining the defendants, “ their officers, contractors, servants, workmen, and agents from taking or attempting to take, and from retaining possession of, the lands in question.”

This was a motion by the plaintiff for a writ of sequestration against the defendants for breach of the injunction by running trains, &c.

The usual two clear days' notice was given.

Mr. Wells, for the defendants, objected that four clear days' notice of motion was necessary. He quoted *Attorney General v. Brantford*, 1 Chy. Chas. 26; *Kelly v. Smith*, 1 Chy. Chas. 364; *Grey v. Hatch*, 2 Chy. Chas. 12; *Wilson v. Gould*, 2 Chy. Chas. 230; *Broughal v. Hector*, 2 Chy. Chas. 434, shewing that under the old practice it was necessary to obtain an order *nisi*, and that therefore the time given when moving for such orders should still be given when moving on notice of motion. He contended that in any event the acts done did not amount to a breach of the injunction.

Mr. Hoyles, contra, contended that it was not now necessary to proceed by order *nisi*, and that in *Munro v. Reid*, (not reported), it had been held by Blake, V.C., that only two clear days' notice was necessary. He argued that the running of trains on the land in question must be referable to the retaining possession of the land, and formed a breach of the injunction.

BLAKE, V. C.—Where a defendant had been guilty of a breach of an injunction the plaintiff might either obtain an order *nisi* or move on notice for the committal of the defendant. Where the party guilty of the contempt was a corporation the plaintiff was at liberty to obtain an order *nisi*, or to move on notice for a sequestration. In the case of an order *nisi* it was ordinarily a four days' order; if notice was served, it was a two days' notice. In either of these cases it was open to the party complaining to move on notice of motion or to obtain *ex parte* an order *nisi*. In the former case the usual two days' notice was given, in the latter the ordinary four days' order *nisi* issued. In *Munro v. Reid* I held that as the party always had the right to move on notice, he need only give two days' notice; and I think that in the present application the same rule holds good. In cases where originally the only mode of procuring a rule was by order *nisi*, and where the order *nisi* has been abolished and the notice of motion takes its place, there it has been held that the same notice must be given in the latter as in the former case: *Attorney General v. Brantford*, 1 Chy. Chas. 26; *Kelly v. Smith*, 1 Chy. Chas. 364; *Grey v. Hatch*, 2 Chy. Chas. 12; *Wilson v. Priest*, 2 Chy. Chas. 236; *Broughal v. Hector*, 1 Chy. Chas. 434. But where, as here, it was always open to the party aggrieved to move in Court on notice to punish the party guilty of contempt of Court, the two days' notice is sufficient.

The injunction which issued against the defendants restrains them, "their officers, contractors, servants, workmen, and agents from taking or attempting to take, and

from retaining possession of the land in question. It is admitted that up to the 15th of December, trains were run across this land by the defendants. I have no doubt this was a taking and retaining possession of the plaintiffs' land so as to be a breach of the injunction. It is explained that this was done by the provisional superintendent of the defendants' railway in ignorance, and that there has been no wilful breach of the injunction. The defendants now undertake to desist. This being so, on payment of the costs of the application of the plaintiff in ten days no writ need issue.

COMMON LAW CHAMBERS.

HUGGINS v. GUELPH BARREL Co.

Special Endorsement—Common Counts—Particulars—Reg. Gen. 20.

The particulars of claim upon a writ of summons specially endorsed to which the defendant appears, do not bind the plaintiff as particulars under a declaration on the common counts, and, in such a case, he must comply with a demand for particulars made by the defendant.

[November 20, 1879 —Mr. Dalton, Q. C.]

The plaintiff issued and served upon the defendants a writ of summons with particulars of claim specially endorsed upon it. The defendants appeared, and the plaintiff declared upon the common counts. The defendants demanded particulars under the common counts, which the plaintiff did not furnish. The defendants then obtained a summons for such particulars.

Aylesworth shewed cause, and agreed that the particulars endorsed upon the writ should stand as the plaintiff's particulars in the cause. As to the question of costs, however, he urged that the writ being specially endorsed, the case was not within *Reg. Gen. 20*, and the costs should be costs in the cause.

G. T. Blackstock supported the summons. The object of specially endorsing a writ of summons is to enable the plaintiff to sign judgment in case of default of appearance. When, therefore, the defendant appears, that object is rendered incapable of accomplishment, and the parties are in the same position as if the writ had not been specially endorsed. The plaintiff, in his declaration, is not

bound by the particulars endorsed on the writ. And even if he were, he would only be bound as to those counts to which the particulars endorsed on the writ were applicable. In this case, among the common counts of the declaration, is the ordinary count for money lent, to which there is no item in the particulars applicable. Unless the plaintiff is ordered to give particulars, he will be entitled at the trial to give evidence under the count, although he has not delivered particulars of his claim under it. A plaintiff may declare for other causes of action than those to which the particulars endorsed upon the writ are applicable: *Sowden v. Sowden*, 4 P. R. 276.

MR. DALTON held that the present case was within the above rule of Court, and that the particulars upon the writ would not bind the plaintiff under the common counts. He, therefore, made an order that the particulars on the writ should stand as particulars under the declaration, with costs to the defendants in any event of the cause.

MCALPINE AND KEEN V. CARLING.

Release of action—Stay of Proceedings.

After issue joined, one of two plaintiffs gave to the defendant a release under seal of all actions and demands. The defendant thereupon moved to stay all proceedings in the suit.

Held, that the release should be pleaded, and that the defendant was not entitled to a stay of proceedings. The other plaintiff was allowed to strike out the name of the releasing plaintiff, and to amend the declaration.

[November 21, 1879.—*Osler, J.*]

The declaration contained three counts. The first and second in trover, and the third for defamation, alleging injury to the plaintiffs in their business.

After issue joined, the plaintiff McAlpine gave the defendant a release under seal of all actions and demands, &c.

The defendant thereupon obtained a summons in Chambers, upon reading the release and the pleadings in the

cause, calling upon the plaintiffs to shew cause why all further proceedings in the action should not be stayed.

The summons was afterwards made absolute by Mr. Dalton, the plaintiff Keen objecting that the defendant should have been left to plead the release, and that the action ought not to be stayed in a summary manner.

G. B. Gordon obtained a rule *nisi* from Hagarty, C. J., calling upon the defendant to shew cause why the order staying proceedings should not be rescinded, or why the name of the plaintiff by whom the release had been given should not be struck out of the record.

On the 11th November, 1879, *Holman* shewed cause, and *Gordon* supported the rule.

OSLER, J.—It is not improbable that the order complained of is one calculated to promote the plaintiffs' own interests, by putting an end to what may be a very unprofitable litigation. The plaintiff, however, contends that if the defendant wants to avail himself of the release he should do so by pleading it, and not by a summary application to stay proceedings.

In this contention I think he is right. I have been referred to no authority, and I can find none, in which the latter course has been taken. On the contrary, the invariable practice has been to plead it. If it had been obtained by fraud, either in the case of a single creditor, or of one of several creditors, the plea might be answered by a replication setting up the fraud. In other cases, as where a release by a nominal plaintiff was set up, in order to defeat the real plaintiff, for whom the former was only suing as trustee, or where it was obtained by collusion between the releasing creditor and the debtor, in order to defraud the plaintiff, the plea might be set aside on a summary application.

The Courts no doubt do sometimes interfere to stay groundless actions, or actions which are an abuse of the process of the Court. *Castro v. Murray*, L. R. 10 Ex. 213;

Dawkins v. Saxe Weimar, L. R. 1 Q. B. D. 499, are good illustrations of the exercise of this jurisdiction. In the former case the plaintiff sued the Clerk of the Petty Bag Office of the Court of Chancery for refusing to seal a writ of error. It appeared that the *fact* of the Attorney-General had not been procured, and it was within the knowledge of the Court that it was the defendant's duty not to seal the writ until that was done. The Court held that the action was absolutely groundless, and stayed it, as being an abuse of the process of the Court. In the latter case the plaintiff brought an action against a public officer, the point on which he relied to sustain it having already been decided against him by the ultimate Court of Appeal in a former action against another officer. The Court stayed the proceedings, as being frivolous and vexatious, and an abuse of the process of the Court. But in both cases it is observed that it is a strong thing to prevent a plaintiff from going on with his action, and that the jurisdiction is one which, in all cases, should be very carefully exercised. In certain actions against Justices of the Peace it has been conferred by Statute; R. S. O. ch. 73, sec. 8.

In the present case I can see no reason why the defendant should not be left to avail himself of the release in the ordinary way. There is nothing in the affidavits or papers which would lead me to suppose that the plaintiff Keen is acting vexatiously in continuing to prosecute the action, as he may have an interest in doing so quite apart from that of the releasing plaintiff, and one which may be effectually followed up by striking out the name of the latter from the record. He is, at all events, in my judgment, entitled to the decision of the Court in the ordinary manner, upon the effect of this release as regards his own interest.

I think the rule should be made absolute to rescind the order staying proceedings, with leave to the plaintiff Keen to amend all the proceedings by striking out the name of the plaintiff McAlpine, making also such formal amendments in the declaration as that may render necessary.

I do not think it is a case for costs.

THE DOMINION TYPE FOUNDING COMPANY V. NAGLE.

Execution Act—Sheriff's Costs—Taxation.

Held, that a Sheriff's bill of fees may be taxed on notice, under sec. 48 of the Execution Act, R. S. O., ch. 66, either at Toronto or in the Sheriff's own county, as the party taxing may elect.

[December 6, 1879.—*Armour, J.*]

The Sheriff of Carleton having executed plaintiffs' writ of *fieri facias* retained a certain amount as his fees and charges. Plaintiffs obtained his bill in detail, and gave him notice of taxation before the Master of the Court of Queen's Bench at Toronto, under sec. 48, R. S. O., ch. 66. The sheriff objected that his bill could not be taxed elsewhere than in his own county. This objection being sustained, the plaintiffs applied to Mr. Dalton in Chambers, under sec. 47 of the Act, for an order for the taxation of the sheriff's bill.

Scott, H. J., shewed cause, arguing that secs. 47 and 48 of the Act were not cumulative; sec. 48 provides for all cases of taxation in accordance with the established tariff, sec. 47 only for cases where the full fees allowed by the tariff were sought to be reduced. Here nothing was asked but a taxation in accordance with the tariff, which could only be had under sec. 48, and in the sheriff's own county; and such a taxation could be had without any order.

Aylesworth supported the summons, contending that either course was open to obtain a taxation of a sheriff's bill, and urged that in this case there were special circumstances making a taxation at the head office desirable. Similar orders to that asked for had frequently been made. He referred to *Brockville & Ottawa R. R. v. Canada Central R. R.*, 7 Pr. R. 372, as a case reported where such an order had been made.

MR. DALTON made the summons absolute, referring the bill to taxation by the Master at Toronto.

On appeal from this decision,

ARMOUR, J., discharged the summons in appeal, affirming Mr. Dalton's order, but in doing so, expressly held that the Master at Toronto should have proceeded with the taxation of the sheriff's bill on the original notice; for sec. 48, R. S. O., ch. 66, clearly gives the right to tax any sheriff's bill, upon notice, either at the head offices of the Courts in Toronto, or at the office of the Deputy Clerk in the sheriff's county, whichever the party taxing may prefer.

BUTLER ET AL. V. ROSENFELDT.

SWEETZER ET AL. V. ROSENFELDT.

Arrest—Foreigner—Temporary residence—Cause of action.

The general rule that it is against the policy of our law to permit a foreigner to follow another into Ontario, and arrest him for a debt contracted abroad, is limited to cases in which the debtor is here on temporary business, and is about to return to his own country. And where the debtor has absconded from his own country to Ontario, and does not intend returning, or intends to go to some other country, the creditor may follow and arrest him here upon a *ca. re.*

An application to set aside an arrest the Judge should not enquire into the particular form of the action, if satisfied that a cause of action exists.

[December 19, 1879.—*Osler, J.*]

The defendants Edward Rosenfeldt and David Rosenfeldt, were arrested under writs of *capias*, issued under orders made by Osler, J. After their arrest, a summons in each case was obtained, calling upon the plaintiffs to shew cause why the defendants should not be discharged from close custody, upon the following grounds: 1. That there was no debt whatever past due by the defendants, or either of them, to the plaintiffs. 2. That the defendant David Rosenfeldt is not liable in any way for the plaintiffs' claim. 3. That the said defendants had no intention of quitting the Province of Ontario, but, on the

contrary had taken up their residence at the city of Toronto. 4. That the plaintiffs were irregular in their proceedings herein, amongst others, in the following particulars: (a) That the affidavits upon which orders for writs of *capias* herein were granted, did not state that the defendants, unless forthwith apprehended, were about to quit Ontario; (b) That the affidavits upon which orders for *capias* herein were granted did not shew any cause of action whatever against the said defendants; (c) That the said affidavits did not shew sufficient facts and circumstances to establish an intention of the defendants to quit Ontario with intent to defraud their creditors generally, or the plaintiffs in particular.

In the suit of *Butler v. Rosenfeldt*, the further ground was taken in the summons that only a portion of the debt sworn to was due by the defendant Edward Rosenfeldt.

J. E. McDougall, for plaintiffs, in each case shewed cause.
George Kerr, Jr., for defendant Edward Rosenfeldt.
Akers, for defendant David Rosenfeldt.

OSLER, J.—It has been said that it is against the policy of our law to permit one foreigner to follow another into this country, and arrest him for a debt contracted abroad. But this rule is limited in its application to those cases in which it appears that the debtor is about to return to his own country, within the jurisdiction of whose Courts both creditor and debtor reside—in short, where the former has only come into Canada on some temporary business, intending to return when that business has been accomplished.

The reason why one foreigner will not be permitted to arrest another under such circumstances is, that he would be thereby committing a fraud upon our law, for where a debtor is returning to the jurisdiction of a Court of the process of which his creditor can avail himself, having only come here for a temporary purpose, it is impossible for the latter to swear that the debtor is about to leave Canada

with intent to defraud or avoid payment of his debt. The facts themselves rebut or displace the fraudulent intent.

But very different considerations apply where the debtor appears to have fraudulently absconded from the foreign country to ours, where the creditor follows and finds him and finds also that he intends to leave Canada, not to, return to his own, but to go to some other country. The creditor then has the right to avail himself of all the remedies provided by our laws, and among them, that of arresting his debtor; and there is no reason why in such case the necessary affidavit should not be made in good faith: *Frear v. Ferguson*, 2 C. L. Ch. 144; *Brett v. Smith*, 1 P. R. 309; *Ex parte Guttierrez*, L. R. 11 Ch. D. 298.

So if the debtor, instead of having come to this country for a merely temporary purpose, intending to return at once to his own, has come here with the intention of remaining or becoming a permanent resident, he may be afterwards arrested by the foreign creditor, if he is about to abscond, even to his own country, for he has not acquired the protection which the merely temporary character of his absence from his own country would have given him, and has become as one of our own citizens: *Romberg v. Steenbock*, 1 P. R. 200; *Blumenthal v. Solomon*, 2 P. R. 51; *Palmer v. Rogers*, 6 U. C. L. J. 188.

In the present cases it manifestly appears that the defendants have absconded from the United States, with intent to defraud the plaintiffs, and that they do not intend to return thither; in fact, that they could not do so without being arrested there.

The plaintiffs' case is, that they intend to escape to Germany, while they themselves contend that they intend to remain in this country, at least until the "spring."

I am clearly of opinion that they are liable to be arrested here, if a proper case is made out of their intention to depart forthwith.

Next as regards the debt or cause of action for which they have been arrested. The cause of action stated in the affidavits on which the writs of *capias* were granted,

is for goods sold by the plaintiffs to the defendants. *Hargreaves v. Hayes*, 5 E. & B. 272, is an authority to shew that an affidavit in this form is sufficient. The defendants, however, deny the existence of any debt for which the plaintiffs can arrest them,—as to Edward Rosenfeldt, that the period of credit upon which the goods were sold to him has not expired, and as to David Rosenfeldt, that the goods were not sold to him at all, but to the defendant Edward Rosenfeldt.

The affidavits, however, do not satisfy me that the plaintiffs in taking these proceedings have been guilty of abusing the process of the Court, or that their claims are utterly devoid of foundation. To warrant me in interfering on this ground, it is necessary that the defendants should make out a very clear case: *Stammers v. Hughes*, 18 C. B. 527; *Stein v. Valkinhuyzen*, E. B. & E. 65. On the contrary, all the affidavits point to the conclusion, which is not indeed attempted to be denied, that both the defendants have colluded to obtain the plaintiffs' goods by a gross fraud, without any intention of paying for them.

Whether, if the goods had been obtained in this country under the circumstances detailed in the affidavits, the plaintiffs could have maintained an action on the common counts, the period of credit not having elapsed, is not important. They could have maintained an action in some form, for the redress of such a fraud. But it appears from the affidavits of professional gentlemen resident in New York, that the law of that State at all events is, that under the circumstances in question here the vendors could at once bring an action for the price of the goods, before the expiration of the period of credit. Whether they can therefore maintain such an action here, is a matter which I ought not to decide on such an application as the present: *Barker v. Lindholt*, 11 W. R. 68. Besides, as was said by Cockburn, C.J., in *Burns v. Chapman*, 5 C. B. N. S. 481, "if the Judge be satisfied that a cause of action exists, it is not for him to enquire into the particular form of action. And even if it should appear to him that the plaintiff is about to

pursue a mistaken or erroneous course of procedure, I think it is no part of the Judge's duty to entertain that question. If satisfied that the plaintiff has a cause of action, all he has to do is to afford him the remedy pointed out by the statute."

Lastly, as regards the intention of the defendants to depart from Ontario. Several affidavits of respectable persons have been filed, as to statements made by the defendant Edward Rosenfeldt and his mother-in-law, in reference to their intended departure for Germany. He and his father were parties to a common fraud, and immediately afterwards absconded, within a few days of each other, to the same place. I have no doubt that they have one other design in common, and that is to evade payment of the plaintiff's claims in any way they possibly can. In the face of the affidavits I refer to, the statements in which are not denied, I cannot attach any weight to the affidavits of the defendants, stating that they intend to remain here at least until the spring, or to the fact that the defendant David Rosenfeldt has leased a house until "the spring," at a rental of \$15 per month, payable in advance.

I think the summons in each case must be discharged, with costs to be costs in any event of the cause to the plaintiff.

WOODMAN V. BLAIR.

Costs—Examination of parties—Breach of promise of marriage.

The parties in an action for breach of promise of marriage not being competent or compellable witnesses for each other, the plaintiff was not allowed the costs of the preliminary examination of the defendant, under R. S. O., ch. 50, sec. 156. But the plaintiff's costs of his own examination were allowed, as this took place at the instance of the defendant.

[December 20, 1879.—Mr. Dalton, Q. C.]

This action was brought for breach of promise of marriage, and a verdict was rendered for the plaintiff, which verdict was subsequently confirmed in term.

Aylesworth, for the plaintiff, moved for an order to allow the costs of the examination of the parties, under orders to examine made in accordance with the provisions of the Common Law Procedure Act, R. S. O., ch. 50, sec. 156.

Roaf, for defendant, objected that this being an action for breach of promise of marriage, the parties were not competent or compellable witnesses and the examinations were of no avail. No costs of them therefore should be allowed. Con. Stat. U.C., ch. 32, allowed a party to call his opponent in a civil suit, and the operation of this statute was extended by 33 Vic., ch. 13, which specially excepted actions for breach of promise of marriage. R. S. O., ch. 62, consolidated the provisions of these acts, and repealed them ; and by sec. 6 it expressly excepted such actions as the present. R. S. O., ch. 50, sec 165, shews that the preliminary examination of parties to the suit is for the purposes of evidence, and as the present examinations could not be made use of as evidence, they were useless, and the costs of them should not be allowed.

MR. DALTON, after reserving judgment, refused to allow the costs of the examination of the defendant, but allowed the costs of the attendance of the plaintiff's attorney at the examination of the plaintiff, as this latter examination took place at the instance of the defendant.

Order made accordingly.

PHIPPS V. BEAMER.

Interpleader—County Court writs—Costs.

In an interpleader matter where several writs were placed in the sheriff's hands, one from a County Court, the others from the Superior Courts, a successful claimant was held entitled to Superior Court costs, as against the County Court execution creditor.

Held, also, that where all the writs are from County Courts, the sheriff is entitled to County Court costs only; but a successful party to the issue is entitled to Superior Court costs.

Masuret v. Lansdell, ante p. 57, remarked upon and modified.

[December 22, 1879.—Mr. Dalton, Q.C.]

This was an interpleader matter, in which the claimant having been successful, applied for an order to bar the execution creditors, and for payment of costs of the issue. Several writs had been placed in the sheriff's hands, of which one was from a County Court and the others from the Superior Courts.

Aylesworth, for the County Court execution creditor, shewed cause in the first instance, and contended that under *Masuret v. Lansdell*, 8. P. R. 57, the claimant was entitled to County Court costs only as against his client.

Ogden appeared for the claimant.

MR. DALTON held that the claimant was entitled to Superior Court costs, as against all the execution creditors. As to the case of *Masuret v. Lansdell*, he remarked that he had since had reason to modify his judgment in that case. He was now of opinion that in interpleader matters, where all the writs are from the County Courts, the sheriff is entitled to County Court costs only, but that the costs of the issue directed between the parties should be taxed to the successful party upon the Superior Court scale, for the reason that the issue in such a case must be tried in the Superior Court.

BANK OF MONTREAL v. FOULDS ET AL.

Enlargement—Term's notice to proceed.

Where a summons was enlarged *sine die* by the consent of counsel, and nothing further was done in the suit for more than a year; Held, that a term's notice of the plaintiff's intention to proceed was necessary, before he could make any motion in the cause.

[December 23, 1879.—Mr. Dalton, Q.C.]

On January 2nd, 1878, the defendants filed their pleas. On the 4th of the same month the plaintiffs took out a summons to strike out certain of the pleas. It was agreed by counsel for both parties that the summons should stand, to be brought up at one day's notice, the defendants agreeing not to sign judgment for want of a replication. Nothing further was done until December 2, 1879, when another summons was obtained for leave to reply and demur.

Ogden, for defendant, shewed cause, and took the objection that a term's notice of plaintiffs' intention to proceed was necessary.

Worrell supported the summons.

MR. DALTON, after reserving judgment, held that a term's notice was necessary, and that the agreement between the counsel, above mentioned, left it to the plaintiffs to take the first step.

Summons discharged.

IN RE HAGEL V. DALRYMPLE.

Prohibition—Division Court—Jurisdiction—Letter.

The defendant, residing at Port Elgin, by letter instructed the plaintiff, an attorney at Toronto, to take certain legal proceedings. The plaintiff, having performed these services, brought the present suit in a Division Court at Toronto, to recover his fees.

Held, that the cause of action arose partly in each place, and that a prohibition should issue.

[December 23, 1879.—*Hagarty, C. J.*]

This was an application for a writ of prohibition to the First Division Court of York, on the ground of want of jurisdiction.

The defendant, who resides at Port Elgin, wrote to the plaintiff, a solicitor, at Toronto, instructing him to take certain legal proceedings. These proceedings were taken, and the solicitor afterwards sued the client to recover the amount of his bill of costs in the First Division Court of York, at Toronto. The defendant then obtained a summons for a prohibition.

Murdock shewed cause, and contended that the post office authorities were the defendant's agents to deliver his letter to the plaintiff at Toronto, and that the contract was by these means as fully completed at the latter place as if the defendant had come personally and given instructions.

G. T. Blackstock supported the summons, and claimed that the whole cause of action did not arise at Toronto, and that consequently the action should have been brought where the defendant resided. He cited *Noxon v. Holmes*, 24 C. P., 541; and *Watt v. VanEvrey*, 23 U. C. R. 196.

HAGARTY, C. J., held, that to entitle the plaintiff to succeed in the suit he would have to prove the writing of the letter at Port Elgin, and the writing of it there became part of plaintiff's cause of action. The whole cause of action did not, therefore, arise in Toronto, but partly in each place.

Summons made absolute, but without costs.

HOORIGAN V. DRISCOLL.

Replevin—Description—Seizure of goods conveyed to a third party—Amendment.

The plaintiff issued a writ of replevin directing the sheriff to replevy "two hundred and thirty sheep and lambs," unjustly detained by the defendant. On the previous day defendant had sold the property to one Gill, in whose possession it was when the seizure was made.

Held, that the above description was not sufficient, and that the articles could not be seized under the writ while they were in the possession of a party not named therein. Plaintiff was allowed to amend the description and substitute or add Gill as a defendant.

[27th January, 1880.—*Mr. Dalton, Q.C.*]

A writ of replevin was issued by the plaintiff on the 31st of December, 1879, directed to the Sheriff of Renfrew, and indorsed to replevy certain property described as "two hundred and thirty sheep and lambs," alleged to have been purchased by the defendant as agent for the plaintiff, and partly paid for with the plaintiff's money, and to be by the defendant unjustly detained. The property was valued at \$550, while the indebtedness of the defendant to the plaintiff was, at the most, \$100. Prior to the issuing of the writ, the plaintiff and the defendant had met, and attempted a settlement of accounts between them. They failed to agree, and the defendant refused to deliver up the sheep and lambs to the plaintiff, unless the full purchase money were paid, at the same time telling the plaintiff that he would sell them to another. This the defendant actually did, one Gill becoming the purchaser on the 30th of December, 1879. It appeared by the affidavits filed, that the plaintiff had notice of this sale prior to issuing the writ and replevying the property, which was done on the 31st of December, while they were in Gill's possession. It also appeared that the sheriff replevied 233 sheep and lambs, instead of 230, as directed by the writ. The writ was then served on the defendant Driscoll, who applied under section 9 of the Replevin Act, R. S. O., ch. 53, to have the writ set aside, on the ground of insufficiency of description

of the property to be replevied, and on the ground that the writ had been improperly ordered to issue by the Judge of the County Court of Renfrew, and on the further ground that the property was replevied out of the peaceable possession of a third person, a stranger to the suit, the defendant being improperly made a party ; or that the copy and service of the writ be set aside, and the goods returned.

W. M. Read shewed cause, and contended that from the nature of the property, a better description could not be given. A good *prima facie* case had been disclosed to the County Judge of Renfrew, who issued the order for the writ, and the grounds of the summons which related to the ownership of the property went to the foundation of the action itself, and could not be disposed of on an interlocutory application in Chambers : *Gilchrist v. Conger*, 11 U. C. R. 197.

Ponton (Beaty, Hamilton & Cassels,) supported the summons. He contended that the affidavits filed by the plaintiff did not establish that the defendant was acting as agent for the plaintiff. The fact that the sheriff had seized more than the proper number of sheep and lambs shewed that the description of the property in the writ was imperfect. This description is the only guide the sheriff has in making the seizure, and should be sufficiently clear to enable him to identify the articles : *Jones v. Cook*, 2 P. R. 396. Before the issue of the writ, the plaintiff was aware that Gill had bought the sheep, and great injustice would be done in actions of replevin if goods could be taken out of the peaceable possession of persons not parties to the action, without demand : *Anderson v. McEwan*, 8 U. C. C. P. 532 ; *Great Western R. W. Co. v. McEwan*, 28 U. C. R. 528. This case did not come within the operation of sections 14 and 15 of the Replevin Act, no attempt having been made to secure or conceal the property. The service was irregular under section 13, the property not being in the possession of the defendant when the seizure was made.

MR. DALTON, after reserving judgment, expressed the difficulty he felt in coming to a decision which would do justice between the parties, and would at the same time prevent the further litigation that would probably arise were the writ set aside absolutely. He held that it was defective in its present form, and that the articles could not be seized under the writ, while they were in the possession of a third party. Under R. S. O., ch. 49, sec. 8, he gave the plaintiff liberty to amend the writ, by substituting or adding Gill as a party defendant, and by changing the description of the property, so as to embrace the whole number of sheep and lambs replevied by the sheriff, and distinguish the number of sheep and the number of lambs respectively. The plaintiff should pay the costs of the application, file new bonds to suit the altered circumstances of the case, and comply with these terms within two weeks; otherwise, the summons to be absolute.

Order made accordingly.

IN RE HOLLAND V. WALLACE ET AL.

Division Court—Garnishee—Jurisdiction—Prohibition.

A plaintiff in a Division Court, proceeding against a primary debtor and a garnishee in a Court which would not have jurisdiction against the primary debtor alone, must prove a garnishable debt in the hands of the garnishee; otherwise, a prohibition will lie.

A garnishee is not a defendant within the meaning of R. S. O. ch. 47, sec. 62.

[February 9, 1880.—*Hagarty, C. J.*]

On the 29th of August, 1879, a summons was issued from the First Division Court of York, calling on the defendant Wallace, as the primary debtor, and on Hallam as garnishee, in the usual form, to appear at the Toronto Court House on the 30th September following. By affidavits indorsed,

it appeared that service was made on the garnishee on the 30th of August, and on Wallace on the 17th of September. The plaintiff lived in Toronto, where Hallam the garnishee also resided. The defendant Wallace lived in Lindsay, where a note, the cause of action, was dated. The note was made payable at the plaintiff's office, in Toronto. Wallace, on being served, was advised by his attorney that the service was void, as he ought to have been served twenty days before the return day. He therefore took no notice of it. Defendant's affidavit stated that on the 3rd of January he was casually informed by the clerk of the Lindsay Court that a transcript of a judgment against him had been received from the Toronto Court, and this was his first intimation that proceedings had been continued on the summons, he having expected another summons. It appeared, from information received from the clerk of the Court, that at the sittings of the Court at Toronto on the 30th of September, on account of the summons not having been served on Wallace twenty days before the sittings, the case was allowed to stand over till the next Court, held on the 28th of October, when the case was tried and judgment given against Wallace, but in favour of Hallam, the garnishee. No affidavit was filed shewing the actual proceedings in the Court.

The defendant then obtained a summons for a prohibition, on the ground that the summons should have been served twenty days before the return day, according to the provisions of the R. S. O., ch. 47, sec. 71, the defendant not residing in the county or adjoining county; that he had not been served with process in due time; and that there was no real garnishee.

Thorne, for the plaintiff, shewed cause.

H. Cameron, Q.C., supported the summons.

9th February, 1880. HAGARTY, C. J.—It seems clear that the Toronto Court had no original jurisdiction over Wallace, the whole cause of action not having arisen within

its limits. It is only under the garnishment clauses of the Act it is pretended that he can be reached. I am of opinion that the garnishee cannot be considered a defendant within the meaning of section 62 of the Division Courts Act, R. S. O., ch. 47. As a matter of fact, there was no right whatever here to proceed against Hallam as a garnishee. There must be a debtor to the primary debtor, and a debt to garnish, under section 124, which gives the general right, and under section 130, *et seq.*, on which these proceedings depend. As soon, therefore, as it was ascertained that Hallam was not a debtor to Wallace, there ceased to be a garnishee; and the jurisdiction, in any view of the statute, ceased to exist as against Wallace. It was on mere surmise or suspicion that Hallam's name was used.

I think any plaintiff, before judgment, venturing to proceed against a debtor, over whom, by himself, a Division Court has no jurisdiction, must run the risk of being able to prove that the person whom he chooses to call a garnishee is really such, and that there is a debt capable of being garnished. Otherwise, the insertion of the name of any friend, willing to allow his name to be so used, would create a jurisdiction not otherwise existing; a process that could always be resorted to. The summons must be absolute for a prohibition.

I do not wish to be understood as expressing any opinion to the effect that the existence of a true garnishee, and a garnishable debt, gives jurisdiction, not otherwise existing, against a primary debtor. It is not now necessary to discuss that question.

As the defendant Wallace did not take any notice of the summons served on him, or object to the Court's jurisdiction over him, I give no costs.

Summons made absolute.

WHEATLY V. SHARP.

Seduction—Arrest under ca. sa.—Indigent debtor—Allowance—Clerk of Crown, jurisdiction of.

In an action for seduction, the defendant was arrested under a writ of *ca. re.*, and judgment having been entered against him, a *ca. sa.* was issued, and he was surrendered by his bail to the custody of the sheriff.

Held, that the defendant was not in custody as a debtor, or on execution, but on *mesne process* as a wrong-doer, and that he was not entitled to an order for payment of a weekly allowance under the Indigent Debtors' Act, R. S. O., ch. 69.

Held, that it is within the power of the Clerk of the Crown in Chambers to make an order for the payment of a weekly allowance to a debtor, under the above Act, where it can legally be made.

Sembler, that a Judge has power to extend the time for appealing against the order of the Clerk of the Crown in Chambers, on an application made after four days from the making of the order.

[February 28, 1880.—*Cameron, J.*]

In this case the plaintiff, on the 14th of February, 1880, obtained a summons from Armour, J., in Chambers, calling on the defendant to shew cause why the order of Robert G. Dalton, Esq., Clerk of the Crown and Pleas in the Court of Queen's Bench, sitting in Chambers, made on the 12th day of January, 1880, ordering the payment of the sum of two dollars weekly to the defendant, should not be set aside and rescinded, on the ground that at the time of making the said order the said defendant was not a debtor in close custody on *mesne process* nor in execution, nor upon an attachment or other process for non-payment of money, as provided by R. S. O. ch. 69, sec. 2; and that there was no authority for making such order.

On the 5th of February, the defendant obtained from Armour, J., in chambers, a summons calling on the plaintiff to shew cause why the defendant should not be discharged from custody for non-payment of the said weekly allowance, according to the terms of the said order.

Both these summonses were enlarged from time to time till the 20th day of February, when they came on for argument. By the affidavits filed, it appeared that this was an action for seduction, commenced on the 15th of October, 1878, and that a writ of *capias ad respondendum*

was issued on the 23rd of October, against the defendant, under which he was arrested, and on the 25th of November following special bail to the action was put in ; that the cause came on for trial in September, 1879, at Goderich, and a verdict was rendered against the defendant for \$250 ; that judgment was entered on the verdict on 27th November, 1879, and a *ca. sa.* issued and placed in the hands of the sheriff of the county of Huron, wherein the venue was laid, to fix bail, to which the sheriff returned *non est inventus*. The bail having failed to surrender the defendant, afterwards, on 8th December, 1879, an action was commenced against them, and they rendered the defendant, on the 16th December, to the custody of the sheriff aforesaid, and the defendant was, at the time of his application for the weekly allowance, confined in the common gaol of the said county, under and by virtue of the said surrender by his bail.

Richards, Q. C., for the plaintiff, contended that the defendant was not a *a debtor* in custody on mesne process or execution, and therefore was not entitled to a weekly allowance under the Act respecting indigent debtors, R. S. O., ch. 69; that the order of the learned Clerk of the Crown in Chambers was on this ground void ; and further, that the subject matter of the order related to the liberty of the subject, and was not therefore within the authority of the said Clerk of the Crown in Chambers to deal with.

Aylesworth, for the defendant, conceded that under the authority of *Hesketh v. Ward*, 4. Pr. R. 158, the defendant must be considered in custody under mesne process, but contended that since judgment, if not before, he must be regarded as a debtor entitled to the benefits of the Indigent Debtors' Act. He further contended that the order of *Armour*, J., extending the time for appealing against the order of the learned Clerk of the Crown in Chambers, having been granted on an application made after the lapse of four days from the date of the order, was void, as the learned Judge had no jurisdiction to review the decision

of the Clerk of the Crown except upon an appeal taken within four days.

CAMERON, J.—*Hesketh v. Ward* is an authority binding on me that the defendant is not in custody on execution, but on mesne process, and that process was issued against him not as a debtor, but as a wrong doer. He is not then in custody for debt, which is the meaning of a debtor in custody on mesne process.

It was not contemplated by the Legislature, in passing the Indigent Debtors' Act, that the circumstances presented by the facts in this case would arise. The requirements of the affidavit to be made by the party seeking to obtain the weekly allowance and the provisions contained in sections 3 and 7 of the Act, clearly manifest that the intention of the Legislature was, that the application for the weekly allowance should be made under section 2, before judgment. Section 3 provides that the discharge of the debtor "shall not, in case the debtor was confined on mesne process, prevent the plaintiff from proceeding to judgment and execution against the body, lands, or goods, according to the practice of the Court." And section 7 declares, "the plaintiff shall be entitled to recover from his debtor all sums paid to him for weekly allowance while a prisoner on mesne process, and upon proof of the amount of such payment before the proper taxing officer, such sums shall be allowed as disbursements in the suit, and be taxed as part of the costs thereof." I understand this to mean that the plaintiff shall recover by the judgment rendered in respect of the cause of action, and not a separate and distinct recovery, for which no machinery is provided. Then section 12 leaves no room, in my mind, to doubt that the person seeking this relief, while in custody on mesne process, must be a debtor in the ordinary sense of that term, and not a wrong-doer; and that, if a wrong-doer, he can only obtain the relief when he is confined by reason of the judgment against him. This section provides, "In case it appears to the Court or Judge that the debt for which such

debtor is confined was contracted by any manner of fraud or breach of trust, or under false pretences, or that such debtor wilfully contracted such debt, or incurred such liability, without having had at the same time a reasonable assurance of being able to pay or discharge the same, or that he is confined by reason of any judgment in an action for breach of promise of marriage, seduction, criminal conversation, libel, or slander, the Court or Judge may order the applicant to be recommitted to close custody for any period not exceeding twelve months."

As to the point whether the appeal against the order of the learned Clerk of the Crown was made in time, I think I am bound by the act of a Judge of co-ordinate jurisdiction, and therefore must assume the time for appealing was properly extended, and have not considered the question whether it was so or not.* But in the view I take, the order of the Clerk of the Crown being *ultra vires*, it is of little consequence whether it is formally set aside or not; the defendant is not entitled to discharge for the plaintiff's non-compliance with the terms thereof. I think it was within the power of the Clerk of the Crown in Chambers to make an order for the payment of the weekly allowance in a case in which such order could be legally made, as it in no way relates to the liberty of the subject.

The plaintiff's summons must be made absolute, and the defendant's discharged, with costs. A fee for only one argument in respect of both summonses to be allowed.

Order made accordingly.

* See *Reg. Gen.*, 21 February, 1870.

CHANCERY CHAMBERS.

RE BERKELEY'S TRUSTS.

Remuneration of Trustees.

Trustees on assuming the trust estate are not to be allowed a commission for merely taking the same over; but trustees, properly dealing with the estate, and handing it over on the determination of the trust, are entitled to one commission, for the receipt and proper application of the estate, payable out of the *corpus*. Trustees are not entitled to a commission for the investment or reinvestment of the funds of the estate. They are entitled to a commission on the receipt and payment of the income of the estate, payable out of the income, and to a compensation for looking after the estate, payable out of the *corpus*. Trustees may not unreasonably be allowed something for services not covered by the commission awarded.

[September 22nd, 1879.—*Blake, V. C.*]

This was an application made by Messrs. Kingsmill & Dickson, trustees under the marriage settlement of Mrs. Berkeley, for remuneration for their services up to the time of the application.

The trust commenced in 1865, and the trustees accounted for all the principal money they had received, amounting to about \$72,000, as well as for the income obtained by them from the fund up to the present time, which consisted of interest on mortgages involving investments or reinvestments of the fund.

The income was payable to Mrs. Berkeley, and the principal money was payable over after her death and certain contingencies to the children, and the main question involved in this application was, whether the *corpus* of the estate, as well as the income, should contribute to the remuneration of the trustees, and if both should be liable, in what relative proportions.

Mr. Cattanach, for the trustees, contended that they were entitled not only to a commission on income, but also to a commission on receiving or getting in the fund and putting it in safety for the first time, and that as the trustees were not going out of the trust the proper way was to allow the trustees out of the *corpus* one half of the commission which would be allowed on receiving and paying over if they were being discharged from the trust, relying on the authorities and arguments in *Robinson v. Pett*, White & Tudor, L. C. Ed., vol. 2, pp. 544, 545.

Mr. Hoskin, for the children, contended that for the present at least the income should bear all the burden, &c.

Mr. Leith, for Mrs. Berkeley, contended that the true principle was, to pay the remuneration, or the chief part, out of the *corpus*, and that in this way the burden would fall in the proper proportion on the tenant for life and remainderman, as the income would be reduced in the same relative proportion as the *corpus* if the commission were paid out of the *corpus*. He referred also to the analogy afforded on payment by trustees of fines on admission to copyholds: *Lewin on Trusts*, 7th ed., p. 547; and on Renewals of Leases, p. 340. He referred also to the principles which govern in determining whether costs relating to a trust estate should be paid out of *corpus* or proceeds: *Morgan & Davey on Costs*, pp. 218, 219, 220; *Carter v. Sebright*, 26 Beav. 374; *Scrivener v. Smith*, L. R. 8 Eq. 310; *Re Whitton's Trusts*, L. R. 8 Eq. 352; *Wood's Trusts*, L. R. 11 Eq. 155. As to incumbrances between tenant for life and remainderman: *Story's Eq. Jur.*, 12th ed., sec. 487; and generally: sec. 482, n. 1.

BLAKE, V. C.—In *May v. May*, 109 Mass. 257, Ames, J., says: “It is contrary to public policy, and in conflict with the true nature and purpose of such trusts, that a guardian should be a gainer by frequent changes of investment, or that his compensation should be increased by increasing the amount of expenditures on the ward’s account. Any specific services, not included in the ordinary range of the

guardian's duties, may be charged in his account, and it will be the duty of the Judge of Probate to make such reasonable allowance for them as their importance and difficulty might require. The true principle would be, adequate reward, according to the circumstances of the case: *Post v. Jones*, 19 How. 150. We should, however, be very unwilling to sanction the practice of putting that compensation in the form of a commission upon the amount expended or reinvested, and therefore we cannot allow these charges in their present form."

In *Re Kellogg*, 7 Paige 267, Chancellor Walworth thus deals with the same matter: "The investment or reinvestment of the fund, from time to time, upon new securities, for the purpose of producing an income therefrom, is not such a paying out of the trust moneys as entitles the guardian or trustee to commissions for paying out the same, within the intent and meaning of the statute on this subject; unless such securities are finally turned over to the *cestui que trust* as money, or otherwise applied in payment on account of the estate. Neither is the guardian nor trustee entitled to charge a new commission for the collecting or the receiving back of the principal of the fund which he has so invested. But he will be entitled to commissions upon the interest or income of the fund produced by such investments, and received and paid over by him. * * The proper rule, therefore, for computing the commissions upon the first annual statement, or passing of the accounts, of the guardian, receiver, or committee, who is required to render or pass his account periodically during the continuance of the trust, is to allow him one-half of the commissions, at the rates specified in the statute, upon all moneys received by him, as such trustee, other than the principal moneys received from investments made by him on account of the trust estate. And he is also to be allowed his half commissions on all moneys paid out by him other than moneys invested or reinvested by him in bonds and mortgages, stocks, or other securities, for the benefit of the trust estate under his care and management; leaving the residue

of his half commissions upon the fund which has come to his hands, and which remains invested or unexpended at the time of rendering or passing such account, for future adjustment when such funds shall have been expended, or when the trustee makes a final statement of his account upon the termination of the trust."

In the last (4th), American edition of the leading cases in Equity, in the notes to *Robinson v. Pett*, 2 Wh. & T. pt. 1, p. 512, there are many cases collected. I have read those which seem in point. Pp. 544, 557, 559, 566, 585, 587, and 599, throw a good deal of light on the subject. The decision of C. J. Shaw, in *Dixon v. Homer*, 2 Metcalf 422, seems to correct, in one point, the decision in *Re Kellogg*, as to lay down the law as it now appears to be generally accepted in that matter: "The case of a trustee is more analogous to that of a guardian. He takes the property to preserve, manage, invest, reinvest, and take the income of it, perhaps for a short period, perhaps for a long course of years, depending on various contingencies. It may happen that the trust will terminate in a few days by the death of the trustee, or his resignation or removal, before any beneficial service is performed. We think, therefore, that no allowance can justly be made, by way of commission, on assuming the trust. An allowance of a reasonable commission on net income from real and personal estate—income received and accounted for—appears to be a suitable and proper mode of compensating trustees for the execution of their trusts. Whether any allowance shall be made, in addition to a reasonable commission, for extra services, at the determination of the trust and settlement of the account, or whenever accounts are settled during the continuance of the trust, must depend on the circumstances of each case, as they may then exist."

I am of opinion (1) that on trustees assuming the trust estate, a commission is not to be allowed to them for merely taking the same over, as they may hold it for but a day, or they may, holding it longer, so deal with it as to disentitle them to any commission whatever; but that the

trustees, properly dealing with the estate, and handing it over on the determination of the trust, are entitled to one commission, for the receipt and proper application of the estate; (2) that trustees are not entitled to commission for the investment or reinvestment of the funds of the estate, as such a mode of remuneration encourages a continued changing of the investments, which may be most injurious to the estate; (3) that the trustees are entitled to a commission on the receipt and payment of the income of the estate, and to a reasonable compensation for looking after the estate; (4) that it is not unreasonable to make some allowance for services not covered by the commission awarded.

In the present case I do not think it unreasonable to allow each of the trustees the sum of \$100 for four times taking over the trust estate, as they became entitled to it, seeing that the estate transferred was that to which the beneficiaries were entitled, opening books, determining as to the mode of the investment, &c. I think also it would not be unreasonable to allow, from 1865 to 1878, a sum of \$50 a year to the trustees for the general supervision of the estate, seeing that taxes were paid, that the insurances were kept up, &c., and that for the year 1878-1879, when the estate had much increased, this charge should be increased to \$150. These sums, amounting in all to \$1,000, must be borne by the corpus of the estate, as they represent charges for the preservation of the estate itself. Up to the time of the application it was admitted that \$20,000 of income had been received and properly expended; on this amount the trustees should receive 4 per cent., making \$800. There will thus be coming to the trustees \$1,800; \$1,000 of which must be paid by the corpus, and \$800 out of the income. This leaves untouched the commission which may be thereafter allowed when the trust ends, so far as these trustees are concerned, for the assumption and handing over of the estate.

I think in the future it would not be unreasonable if the trustees charged against the income \$240, and against the corpus \$150, annually, for the commission.

The costs of this application must be borne, half by the corpus and half by the income. See *Thompson v. Freeman*, 15 Gr. 384; *Carter v. Sebright*, 26 Beav. 374.

YOUNG v. WRIGHT.

Partition—Receiver—Stranger in possession—Practice.

A notice of motion for partition having been served the plaintiff moved for an injunction restraining the defendant from collecting rents, and for a receiver. It appeared that the defendant was a stranger, whose right to be in possession was denied.

Held, that no relief could be had against him without bill filed.

[September 23, 1879.—*Blake, V.C.*]

McArthur, for the plaintiff, moved for an injunction to restrain the defendant from collecting rents, and for a receiver. Notice of motion had been served for an order for partition under General Order 640, which was returnable on the 6th October following.

C. Moss, for the defendant.

BLAKE, V.C.—It appears on the affidavits that the defendant now sought to be restrained is not one of the joint owners, but a stranger in possession, whose title to be in possession at all is denied. No relief can be got against him on motion without a bill filed. There must be some proceeding in the nature of an ejectment to oust him; and that relief cannot be granted on a summary application under Order 640.

Application dismissed, with costs.

ENGLISH AND SCOTTISH INVESTMENT CO. V. GRAY.

Special endorsement on bill in mortgage suit—Variation of on taking account and settling decree.

The special endorsement on a bill claimed a certain amount to be due under the mortgage (which contained the usual covenant to insure). After the service of the bill the plaintiff paid certain premiums of insurance.

BLAKE, V. C., directed notice of settling decree and taking account to be served, and the plaintiffs' claim to be allowed on proper proof of the payments being produced.

[23rd September, 1879.—*Blake, V.C.*]

This was a suit on a mortgage (containing a covenant to insure,) against the original mortgagor and mortgagee the latter having assigned to plaintiff and covenanted for payment.

The bill had been served on both defendants, specially endorsed, claiming amount due up to the filing of the bill with subsequent interest. Since the service of the bill the plaintiffs had paid certain premiums of insurance, which they claimed to have allowed in the decree. Assistant Registrar McLean declined to allow the premiums or receive evidence of payment because not covered by the endorsement. One of the defendants, the mortgagor, lived in the country and the other, the mortgagee, in Toronto.

Mr. Ewart, for the plaintiff, asked for direction of the Court under the circumstances.

BLAKE, V. C., directed notice of settling decree and taking account to be served on the defendant living in Toronto, and that the claim of plaintiff for the premiums should be allowed on proper evidence being produced of its payment.

FLEMING V. McDougall.

Sale under decree—Application of purchase money—Vesting order.

The bill was filed by a second mortgagee, the first mortgagee not being made a party. At a sale under the decree M. purchased the land, and afterwards paid the purchase money into Court; he then mortgaged the land, then conveyed his equity of redemption, and then took out a vesting order. Grant, a subsequent mortgagee, claimed payment of his claim out of the moneys in Court. On the 19th November on the application of M., the Referee made an order, directing payment to the assignee of the first mortgagee of his claim out of the purchase money in Court.

It appeared that M. thought he was purchasing free from incumbrances, and was ignorant of the first mortgage.

On appeal, PROUDFOOT, V. C., upheld the Referee's order.

[November 19, 1879.—*The Referee.*]
[February 12, 1880.—*Proudfoot, V.C.*]

This was an appeal from the order of the Referee.
The facts appear in the judgment.

Mr. *Cassels*, for the appellant
Mr. *Moss*, for the purchaser, McDougall.

PROUDFOOT, V. C.—In this case the usual mortgage decree for sale was made, the plaintiff being a second mortgagee, and the first mortgagee not being a party to the suit. The property was sold to F. M. McDougall. He mortgaged the lands—then conveyed the equity of redemption, and then obtained a vesting order. These conveyances were in the usual short forms, under the statute.

McDougall then applied to the Referee, who on the 19th November, 1879, made an order for payment of \$1,549.78 of the purchase money in Court to the assignee of the prior mortgage to discharge it. The application to the Referee was for an order for payment out of this sum, or for an order vacating the vesting order as having been improperly and inadvertently obtained by the purchaser without the advice of his solicitor.

J. M. Grant, a subsequent mortgagee, appeals from this order.

The sale, under the conditions in this case, must be taken to have been free from incumbrances, and it is quite clear upon the affidavits, and indeed was not disputed, that McDougall in purchasing thought he was doing so free from incumbrances.

But it is said that having taken a vesting order, he is in the same position as if he got a conveyance, and is only entitled to what it gives him. And for this is cited *Kincaid v. Kincaid*, 6 Pr. Rep. 93, *per* Strong, V. C., and *Re Buck—Peck v. Buck*, 6 Pr. Rep. 98, *per* the Chancellor. The reason for the rule is, that when the purchaser does certain acts shewing an intention on his part to fulfil the contract, and to waive any claim in regard to the matter in question, he will be bound by it. This reason ceases where he was ignorant of the incumbrance or other defect in the title, as has recently been decided with some of his usual emphasis by the Master of the Rolls in *In re Turner and Shelton*, L. R. 13 Chy. D. 130. And it seems to me that the reason should also cease when it is satisfactorily established that the purchaser's act was occasioned by inadvertence, mistake, or without proper advice. The evidence upon the subject is quite clear, and has not been answered in any shape. The purchaser was under a mistake as to the practice of the Court, and paid all the money into Court without seeing any of it applied in discharge of the prior mortgage. I think a sufficiently strong case is made out to justify vacating the vesting order, if that were necessary, which it would not seem to be, as the same end is attained by the order for payment without vacating it.

The only other objection is that the purchaser is not the proper person to make the objection:—that the mortgage and deed executed by him were under the short form of Conveyances Act, and it is said that the covenants in these only extend to his own acts, that he is not bound by them for the prior incumbrance was not made by him. It is a

sufficient answer to this objection that the covenants in a short form mortgage are absolute, and extend to all incumbrances whether made by the mortgagor or not; and therefore that he has an interest in seeing this mortgage discharged, and it is also sufficient for this application, that the deeds were made before the vesting order was obtained.

I think, therefore, that the order of the Referee was right and the appeal is dismissed, with costs.

RE JOHN RANDALL.

An application was made by petition to declare R. a lunatic, and the petitioner failing to produce sufficient medical testimony, asked for an order dismissing the petition.

PROUDFOOT, V. C., declined to make such order, but made an order declaring that the Court did not see fit to make any order on the application.

[February 9th, 1880.—*Proudfoot, V.C.*]

This was an application to declare John Randall a lunatic.

The motion was ordered to stand over, in order that further medical testimony might be produced.

This could not be obtained, and counsel for petitioner asked for an order dismissing the petition.

PROUDFOOT, V. C., declined to make such an order; but allowed one to go declaring that the Court did not see fit to make any order on the application.

Winchester, for the petitioner.

TRUST AND LOAN COMPANY V. KIRK.

Mortgage suit—Interest payable in advance—Computation of in account under decree in.

Interest on a mortgage was payable half-yearly in advance on the 1st of April and October.

The mortgagee filed a bill for sale, and the Registrar on taking the account (in the latter part of January) fixed a day in July following for payment, and allowed the plaintiffs' interest to that date, but refused to allow him the half year's interest, payable in advance on the 1st of April.

On appeal, PROUDFOOT, V. C., upheld the Registrar's ruling.

[—The Registrar.]
[February 12, 1880.—Proudfoot, V. C.]

This was was an appeal from the Registrar. The facts sufficiently appear in the judgment.

Mr. Marsh, for plaintiffs.

Mr. Plumb, for defendant.

PROUDFOOT, V. C.—A mortgage suit. The interest was payable half yearly in advance.

The plaintiffs are the mortgagees, and have filed their bill for sale of the property. The interest is payable on the 1st April and 1st October. In taking the account of what is due to the plaintiffs, the Registrar has appointed the day for payment of the money some time in July, but has refused to allow the plaintiffs the whole gale of interest falling due in April, but only so much as will accrue due till date of payment.

The mortgagees ask a direction that they are entitled to the whole six months' interest due in advance in April.

I think the Registrar is right. If the mortgagor were applying to pay off the mortgage, while the mortgagees were content to let the security remain, I suppose the practice would, justify them in claiming some months' interest in advance. But that proceeds on the ground that they must have time to look out for an investment for the money. The case is wholly changed when the mortgagees are calling in their money,—then they will be entitled to interest for the time the money has been out on loan only.

Interest in itself implies forbearance, and it is a sum given for the use of the money for the time the borrower has it: *Re Goldsmith, ex parte Osborne*, L. R. 10 Ch. 41. There is nothing in the nature or terms of the security to alter this. The payment in advance does not entitle the mortgagee to call the money in and claim interest for a time beyond the time fixed for payment. There is no indication that the stipulation was in the nature of a penalty. The power to distrain for arrears of interest does not carry it further. These are only modes of enforcing payment of interest that has been earned. If payment of the April gale of interest were enforced, it would involve a right in the mortgagor to six months from that time for payment, and I think his right in that respect could be actively enforced. The claim of the mortgagees cannot be increased by their having the account taken here, and as the plaintiffs seek to have a day in July appointed for payment, the interest will only be computed to that day.

The application is refused.

HYDE V. BARTON.

Sale in mortgage suit—Application of purchase money—Delay in proof of claim by encumbrancer—Costs.

The widow of a mortgagor, the defendant in a mortgage suit, did not prove her claim for dower on the reference before the Master, as it was not then certain that the rights of the mortgagee would be fully protected, and she was not found an incumbrancer by the report.

By consent of all parties a sale was had, and the purchaser paid ten per cent. of the purchase money down, but subsequently applied for and obtained from the Referee an order dispensing with the payment of the purchase money into Court, and vesting the estate in the purchaser.

The widow opposed the granting of this order, claiming to be allowed in to prove her claim for dower, but without avail.

On appeal, PROUDFOOT, V.C., allowed the appeal, and reversed the Referee's order, but without costs, as the dilatory conduct of the widow had invited discussion.

[January 13, 1880.—*The Referee.*]

[February 12, 1880.—*Proudfoot, V.C.*]

This was an appeal from the order of the Referee. The facts sufficiently appear in the judgment.

Mr. Murray, for the widow.

Mr. Cassels, for the purchaser.

Mr. Hoyles, for the plaintiff.

PROUDFOOT, V.C.—This was a suit for sale upon a mortgage. The defendants were the widow and heirs of the mortgagor. The widow had executed the mortgage, but was entitled to dower, after giving full effect to the rights of the mortgagee.

The usual decree was made, and under it the Master proceeded to ascertain the incumbrances on the property. The widow did not prove her claim for dower, as it was not then certain that the rights of the mortgagee would be fully protected, and the proof would be only a needless expense; and the Master made his report on 30th June, 1879, finding that the only incumbrancers were certain persons named, not including the widow.

By consent of all parties, a sale was had, under an order of 25th September, 1879, at an earlier date than could

otherwise have been had. The sale took place on 15th October, 1879, when one Campbell became the purchaser at the sum of \$5,000, ten per cent. to be paid at the time of sale and the remainder of the purchase money within thirty days thereafter.

A motion was made by the purchaser, on the 23rd December, 1879, for an order dispensing with payment into Court of the purchase money of the lands, and for a vesting order; and, on the 13th January, 1880, the Referee made the order dispensing with the payment into Court, and vesting the estate in the purchaser.

The application was opposed by the widow, who desired to prove her claim for dower, and read in support of it the statement in the bill that she was entitled to it, and the affidavits of herself and her father establishing her age and state of health.

I apprehend that the same principles should govern an application to dispense with payment into Court as apply to an application for payment out of Court. Had the money been paid into Court pursuant to the usual practice under such decrees, it could not have been paid out without notice to all the parties to the suit, including the widow: *Dan. Chy. Prac.* 1649; and upon the hearing of such an application, I cannot doubt that an opportunity would have been given to her either to prove her claim, or to make an application for the purpose, when, I think it is clear, she would have been allowed to establish her claim, at the expense of indemnifying the parties for any costs that might have been occasioned to them by her tardy proof.

If the purchaser choose to pay the incumbrancers, and not to pay the money into Court, he does so at his own risk. It is unfortunate for him that he has varied from the usual practice of the Court, but he cannot be allowed in this manner to injure the dowress.

I think the appeal should be allowed, and the order reversed, but as the dilatory conduct of the widow invited discussion, it will be without costs.

RE TAYLOR.

Title by possession—Infancy—Statute of Limitations.

In 1879, *Beverley Sharp Taylor* filed a petition to quiet the title to certain land. It appeared that in 1854 one W. was the owner in fee of the land. In November of that year he died intestate, leaving a widow and children, the youngest of whom was born on the 13th January, 1853. The widow and children lived on the land till the fall of 1855, when they left, and in the spring of 1856 T., the father of the petitioner, entered into possession, erected buildings on the land, and used and dealt with it as his own from 1856 till his death intestate, in 1872. His widow received the rents till the fall of 1878, when she and the co-heirs of the petitioner conveyed the lot to him.

It appeared that some agreement was made between W.'s widow and T., when the latter took possession, but its terms were not definitely established. The youngest and other children of W. claimed the land under this agreement.

THE REFEREE OF TITLES held them barred by the Statute of Limitations. On appeal, **BLAKE, V. C.**, held, that the petitioner and his father having notice of the claims of the infant heirs of W., the Statute of Limitations did not, during their infancy, give a title, so as to enable the petitioner to obtain a certificate.

[*The Referee of Titles.*
[February 19th, 1880.—*Blake, V. C.*]]

REFEREE OF TITLES.—It appears from the evidence that the land in question was formerly owned by B. F. Wanzer. In 1854, he appears to have been living on it with his family. In that year he left Orillia; and in November of that year he died intestate. His widow and children (the contestants) continued to reside on the lot (which was then of small value, being worth only \$40 or \$50,) until the fall of 1855, and in the following spring James Douglas Taylor, the petitioner's father, entered into possession. There had been a small log house on the lot, which had been rendered uninhabitable prior to his entrance into possession, and at first the only use that Taylor made of the land was as a garden. After some little time he appears to have erected houses on the property, and from 1856 until his death in 1872, he exercised acts of ownership over the lot, and always used and dealt with it as his own property. After his death his widow received the rents until the fall of 1878, when she and the co-heirs of the petitioner joined in conveying the lot to him.

The contestants claim to be entitled to the land on the ground that James D. Taylor entered into possession under an agreement with Mrs. Wanzer. There is a conflict in the evidence of the contestants' witnesses as to the terms of this agreement—Mrs. Wanzer stating that Taylor was to have a lease of the place for ten years, or longer, but at any time after the ten years he was, on demand, to deliver up possession, on the terms of paying the taxes and make improvements on the lot; and the other witness, William Moffatt, stating that the agreement was that Taylor was to hold the land until the youngest child came of age, on the terms of building a house and paying the taxes. The youngest child was born on the 13th of January, 1853. Consequently it is contended that Taylor's possession only became wrongful, assuming that he entered under that possession, in January, 1874, and that since then there has been no sufficient possession to give title under the statute.

I think that the fair conclusion to be drawn from the evidence is, that some such agreement as that above stated was made by Mrs. Wanzer with Taylor, and that he got possession on the faith of it. But whether it was a lease for ten years or until the youngest child of Wanzer came of age, is not clear. I rather think the weight of evidence inclines in favour of the proposition that it was until the youngest child of Wanzer came of age. There are, however, difficulties connected with this agreement, assuming it to have been made, which appear insuperable objections to its being used as a shield against the operation of the Statute of Limitations. In the first place it was made with Mrs. Wanzer, who had no title to the lot except as a dowress, whose dower had not been assigned. Assuming the lease was otherwise valid, however, Taylor and those claiming under him would probably be estopped from disputing their lessor's title. And I apprehend that even though Mrs. Wanzer had no title at all, yet she would, if the lease were valid in law, have been entitled to claim the benefit of her lessee's possession, as giving her, and not

the lessee, a title under the statute. The lease in question, however, whether it were for ten years or until the youngest Wanzer child came of age, was clearly invalid, inasmuch as it does not appear to have been by deed : (R. S. O. ch. 98, sec. 4, Statute of Frauds), and whether it was signed by Mrs. Wanzer and Taylor, or either of them, is doubtful. Whatever effect the parties may have intended the instrument to have, therefore, it is, I think, clear that in law it was inoperative, and that so far as Mrs. Wanzer was concerned, Taylor became tenant at will, and that she was barred by the Statute of Limitations in the spring of 1877.

Then with regard to the heirs-at-law of Wanzer, I think it equally clear that they can stand in no better position. I do not think the children could claim any benefit from the alleged agreement entered into by their mother with Taylor. She had no power or authority to act for them: they were in no way bound by what she did, neither can they claim any benefit therefrom. Their rights under the present Statute of Limitations are, therefore, clearly barred in my opinion.

The claims of the contestants must, therefore, be barred, but I think there should be no costs.

BLAKE, V. C.—Whatever difficulty there may be in solving the question, whether there was an agreement in writing between Virginia Wanzer, widow of Benjamin Franklin Wanzer, and James Douglas Taylor, and as to the nature of this agreement, there can be no doubt that James Douglas Taylor knew of the position of the property and the claims thereto of the widow and her children. He knew of their claim, and it is not pretended that the present petitioner was ignorant thereof. The question then is, can the petitioner, under such circumstances, claim title by possession, where such possession was taken when these children, the heirs, were infants, and where the possession was taken with knowledge of this fact and of their rights. In *Morgan v. Morgan*, 1 Atk. 488, Lord Hardwicke says : “ When any person, whether a father or a stranger, enters

upon the estate of an infant and continues the possession, this Court will consider such person entering as a guardian to the infant, and will decree an account against him, and will carry on such account after the infancy is determined." In *Blomfield v. Eyre*, 8 Beav. 258, Lord Langdale says: "Considering the infancy of the plaintiff and the notice which the defendant possessed at the time of his purchase, it appears to me, that if the plaintiff establishes his title, he will be entitled to consider and treat the defendant as having possessed the estate in the character of bailiff, and as being now liable to account accordingly." In *Hicks v. Sallitt*, 3 DeG. M. & G. 815, Lord Justice Turner approves of the rule thus laid down, "According to the law of this Court, whoever enters upon the estate of an infant, is held to have entered as bailiff or guardian." My brother Proudfoot adopted this conclusion in *Courcier v. Courcier*, 26 Gr. 308, "The general rule in equity is, that an infant is entitled to treat a person who takes possession of his estate as his bailiff or agent, to get, if he likes, from him an account of the rents and profits, and a decree for possession." In *Quinton v. Frith*, L. R. 2 Eq. 415, the Vice-Chancellor, after considering the authorities, closes his judgment with, "The conclusion that I draw from all these cases is, that where any person enters upon the property of an infant, whether the infant has been actually in possession or not, such person will be fined with a fiduciary position as to the infants: 1, whenever he is the natural guardian of the infant; 2, when he is so connected by relationship or otherwise with the infant so as to impose upon him a duty to protect, or at least not to prejudice his rights, and 3, when he takes possession with knowledge in express notice of the infant's rights. Indeed the last ground is but an instance of the application of the general principle, that a person entering into possession of trust property, with notice of the trust, constitutes himself a trustee, in which case, unless he enters as a purchaser for value, and continues in possession for twenty years from his purchase, or unless the trust be merely constructive, the

statute will afford no defence. In this case, on the grounds which I have already stated, I am of opinion that the Friths having, after the death of Anne Quinton, accepted a conveyance of the lands from the petitioner's natural guardian, with express notice of the petitioner's rights, must be deemed to have been the bailiff of the petitioner during his infancy. I am also of opinion that their continuance in possession after the death of Anne Quinton, with such notice, makes their possession from the time of her death of a like fiduciary nature, even irrespective of those deeds; and accordingly that the bar of the statute does not exist.

I think, on the authorities, that Beverley Sharp Taylor does not shew a title by possession as claimed by him, and that this application should be allowed, and his petition be dismissed, with costs.

The petitioner may be entitled to some of the interests in the land, and may have a claim for improvements. I simply hold that the Statute of Limitations did not, during the infancy of the heirs, give the petitioner a title so as to enable him now to obtain a certificate.

BISSETT V. STRACHAN.

Dismissal of bill before answer—Defendant's costs.

A bill had been filed but not served, and was subsequently dismissed with costs by the plaintiff. It appeared that, though no answer had been drawn, the defendant's solicitor had received instructions to defend some two months before the dismissal of the bill.

Held, that defendant was entitled to tax instructions, and the costs of the taxation.

[February 23rd, 1880.—*The Master in Ordinary.*]

The bill had been filed by a simple contract creditor to obtain judgment to prevent the alienation of land.

During the continuance of the suit, one of the defendants made an application in Chambers to have the *lis pendens* removed. This was granted, with costs. The plaintiff then dismissed his bill, with costs.

The defendant above mentioned thereupon brought in his bill for taxation, which consisted of only one item, viz.: Ins. to defend, \$4, together with the usual charges of having a bill taxed.

It appeared by affidavit that the bill had never been served, and that no answer had ever been drawn or filed; but defendant's solicitor swore that he had taken instructions to draw the answer some two months before the dismissal of the bill.

THE MASTER, on appeal from the Taxing Officer, held that the defendant was entitled to tax his instructions and costs of taxation; but they were taxed at \$2 only, because instructions had already been taxed on the motion to remove the *lis pendens*.

H. Cassels for plaintiff.

Ewart for defendant.



MASTER'S OFFICE.

COURT V. HOLLAND—EX PARTE DORAN.

Subsequent encumbrancer—Claim of—Onus of proof—M. O.

A decree for redemption was made, which directed an account to be taken of the amount due by the plaintiff, representing the mortgagor, to the defendants.

The defendants, on proving their claim in the M. O., produced their mortgages, and filed an affidavit verifying their claim and stating that \$20,309.88 was due them for moneys advanced by them to the mortgagor and secured by the said mortgages.

Held by the Master in Ordinary and affirmed by BLAKE, V. C., that their claim was *prima facie* proven, and the onus of reducing the amount of it rested on the plaintiff.

[December 2nd, 1879.—*The Master.*]
 [January, 1880.—*Blake, V. C.*]

The facts appear in the judgment.

Mr. MacLennan, Q.C., and Mr. Riordan, for the plaintiff.
 Mr. D. Black, for the defendants, the Dorans.

THE MASTER IN ORDINARY.—The decree in this case is one for redemption, and directs an account to be taken of what, if any thing, is due from the plaintiff to the defendants, or any or either of them, in respect of the mortgaged premises in question.

The mortgagees, the Dorans, have produced their mortgage deeds, and have filed an affidavit verifying their account, in which they state that there is due to them, upon and by virtue of their two mortgage securities, “the sum of \$20,309.88 for moneys advanced by us to the mortgagor, and secured by the said mortgages.” The question is now raised, whether the mortgagees are bound to prove

the actual advance of the moneys secured by the mortgages, or whether the onus of reducing the claim rests upon the plaintiff, who now represents the mortgagors?

In support of the plaintiff's contention that the mortgagees are bound in the first instance to give evidence in proof of the actual advance of the money, reference is made to the passage in *Daniel's Practice*, (Perkins's 4th ed., p. 1209), where it is said: "The state of facts must be accompanied by an affidavit from the claimant that the debt remains due. Such affidavit, however, is not intended as evidence to the Master in proof of the debt, and must not be used by him as such. * * When the debt is contested no attention is to be given to the affidavit."

It is also urged that the Statute, 14 & 15 Vic. ch. 45, sec. 4, (R. S. O. ch. 99, sec. 4), passed to make, in the case of an assignee of a mortgage proceeding to foreclose, his affidavit sufficient *prima facie* evidence of the state of the account, implies that where the party claiming is the original mortgagee it is different, and the affidavit has not the same effect.

Now dealing first with the question as to the statute, it is clear, on looking at it, that it does not touch the point at all. The statute was passed to relieve the assignee of a mortgage from being compelled to do more in the first instance than to pledge his own oath to the correctness of the mortgage account. That is, as the statute says, "No affidavit or oath shall be required from the mortgagee or any intermediate assignee denying any payment to such mortgagee or intermediate assignee, unless the mortgagor or his assignee, or the party proceeding to redeem, denies by oath or affidavit the correctness of such statement of account." Or, in other words, until the correctness of the account as brought in by the assignee was denied under oath, he had not to produce any evidence as to payments or account of rents and profits by the original mortgagee or by any assignee prior to the time when he became possessed of the mortgage.

At the time when that statute was passed it was not

necessary for the claimant to state in his affidavit any thing as to the amount actually advanced. The first order of Court in this country, as to proving mortgage claims, was an order passed on the 28th of January, 1845, (No. 173, in Edition of Orders, 1846), and that provided that "it shall not be necessary for the plaintiff to set forth in his state of facts any thing more than the date of the mortgage ; the principal sum secured thereby ; assignments thereof, (if any), and prove from what date interest is claimed, together with any payments which may have been, or may be admitted to be, made in discharge thereof, and if any thing more be stated, and which shall appear to the Master to be unnecessary, the same shall be disallowed in taxation of costs."

When the orders of May, 1850, were promulgated this order was, among others, abrogated and discharged, and no other order on this subject was enacted in its place until the orders of 1853 were issued. On that occasion an order (32 sec. 27, now Con. Gen. Ord. 432), was made to this effect, that, when a cause is heard upon an order to, take the bill *pro confesso* in a suit for the foreclosure of the equity of redemption on any mortgage property the plaintiff is to produce, at the hearing, an affidavit which is to state the amount advanced upon the securities, &c. That order was evidently intended to apply to cases where no reference to the Master was required, for the order goes on to say that upon production of such proofs and documents, the Court may at once determine the amount due, without a reference to the Master or any further enquiry.

In *Sterling v. Riley*, 9 Gr. 346, Vice-Chancellor Esten held that the Master should, in all cases where the bill had been taken *pro confesso* against the mortgagor, require the plaintiff to shew how the money was advanced, saying, "even if not in all cases, which, however, would be desirable." That expression of opinion shews that though it might be desirable to make the enquiry in cases where the bill is not *pro confesso*, it is not essential that the Master should do so.

It must be remembered that at the time *Sterling v. Riley* was decided, many mortgages were being proceeded on, made when the usury laws were in force. The reason assigned for requiring a statement as to the amount actually advanced may have been, and has generally been understood to have been, that mortgages were frequently made securing part of an amount in excess of the amount actually advanced in order to evade, if possible, the law, which forbade a higher rate of interest being reserved than 6 per cent.

The wording of order 432, as it stands in the Con. Orders, is in accordance with the view I have expressed, that the order was intended to apply only in cases where there is no reference to the Master. There the order is expressed thus: "Where the cause is heard upon an order to take the bill *pro confesso* in a suit for foreclosure or sale, and no reference as to incumbrances is required, the plaintiff is to produce," &c.

Apart then from our order 432, there is nothing in our orders or practice which requires from the mortgagee any statement as to the amount actually advanced, unless it was required by the English practice, which prevails where our own orders were silent.

The passage cited from *Daniell's Practice* is relied upon as shewing that it is required in England. But when that passage is examined, it will be found that it refers only to claims for simple contract debts. In the case of a bond or mortgage debt, the production of the bond or mortgage was additional evidence and was always, with an affidavit stating the amount claimed as due, sufficient to make a *prima facie* case for the claimant.

In *Bennett's M. O.*, p. 54, where the proof of such claims is treated of, it is said, "should, however, the demand be disputed the affidavit made and left with the state of facts is not attended to by the Master, but the party disputing the demand prepares interrogatories for the examination of the creditor."

The form of affidavit at one time in use in England,

(*Bennett's M. O. App.*, p. 21), contains an allegation that the mortgagor applied for an advance of the sum of so much, which "this deponent did advance and lend accordingly." The form given in *Smith's Practice*, (2nd vol. p. 511, ed. of 1837), does not, however, contain any express, or even implied, statement that a certain amount was actually advanced and lent. The state of facts, according to *Smith*, (2nd vol., p. 304), states "what, if anything, has been received for principal money, what on account of interest, and what remains due," or, according to *Bennett*, (p. 54), it is accompanied by an affidavit of the amount of the demand and of the execution of the bond or mortgage."

The distinction is well settled between the proof to be given in the case of a simple contract debt, to which the passage in *Daniell* refers, and the proof of a bond or mortgage debt."

Counsel in the case of *Rundell v. Lord Rivers*, 1 Ph. 88, denied that there was any such distinction, and thereupon Lord Cottenham sent the question to the Masters, "Whether it is the practice in the Master's Office to require that the affidavit of defendant should state the consideration for which the bond was given, as in the case of simple contract debts?" In reply eight of the Masters certified that it was not necessary, adding, however, that "where a case of suspicion is raised as to the consideration, we then enquire as to the validity of the bond."

That actual proof of the lending and payment of the consideration money was not required, had been decided long before in *Holt v. Mill*, 2 Vern. 278, but that case does not appear to have been cited to Lord Cottenham.

The question was very fully discussed and considered by Vice-Chancellor Wigram in *Whitaker v. Wright*, 2 Ha. 310, and there it was held (p. 315) that the Court requires an affidavit of the truth of the debt from the creditor, which at law is not required, and this affidavit is required to extend to the consideration of a simple contract debt, but not to the consideration of bond or other specialty debts.

It was not, perhaps, necessary to have dwelt so fully as I have done upon this point, for the question has since come before our own Court and been decided in favour of the mortgagee.

In *Warren v. Taylor*, 9 Grant 64-5, Vice-Chancellor Esten disposing of the question said: "The mortgage having been produced, and the plaintiff (the mortgagor) having made affidavit in the usual manner claiming the whole amount secured by it with interest, I think the onus lay upon the defendants, Ross, Mitchell, and Fiskin, to reduce it."

The later case of *Elliott v. Hunter*, 24 Gr. 430, is a decision of the full Court on rehearing. On an appeal from a Master's report finding the full amount of a mortgage to be due, an order had been made (15 Gr. 640) referring the case back to the Master to review his report, with liberty to the defendants (the mortgagees) to give evidence to shew the amount due upon the mortgage. The order was, on rehearing, varied by directing that "the plaintiffs (the mortgagors) should be at liberty to give evidence to reduce the amount claimed." The Court were of opinion that as the decree was in the usual form the onus of reducing the amount of the mortgage was cast on the mortgagor.

The Vice-Chancellor who heard the cause thought there were circumstances of suspicion, still, as he had allowed the usual decree to issue, the Court held that the Master could not shift the onus of proof.

Here the decree is in the usual form of a redemption decree, and the mortgagees have made the usual affidavit and produced their mortgage deeds, so the onus of reducing the claim rests on the plaintiff who represents the mortgagors.

On appeal, BLAKE, V. C., upheld the Master's judgment.

COURT V. HOLLAND—EX PARTE HOLLAND AND WALSH.

Taking accounts in Master's Office—Evidence admissible.

Two partners in business (T. & R. O'Neill) executed two mortgages in favour of J. W. W. assigned the mortgages to H., by way of derivative mortgage, on the 21st March, 1877. In January, 1877, the O'Neill's became insolvent, and the plaintiff, their assignee, filed a bill to redeem these mortgages. After decree W. became insolvent, and the suit was revived in the name of P. & P., his assignees, in his stead.

On the reference H. claimed so much of the amount due on the original mortgages as would satisfy his derivative mortgage, and P. claimed the remainder. Against their claims the plaintiff filed two similar surcharges, one against H. and the other against P. & P. In support of his surcharges the plaintiff offered the following evidence :

1. A certified copy of the evidence taken in an action at law brought by the plaintiff against W., in which he recovered judgment, in the spring of 1879, for a considerable sum as the unpaid purchase money for goods sold by the O'Neills to W. A certified copy of the judgment of the Court of Common Pleas on a rule for a new trial, and an exemplification of the judgment roll.
2. The books of the firm of T. & R. O'Neill.
3. The books of W.
4. A certified copy of the depositions of W. taken in this suit before the Master at Cobourg prior to the making of the decree.

Held, 1. That the evidence of the common law action could not be read as against either H. or P. & P., but that the evidence of W. himself might possibly be received against his assignees P. & P., as admissions made by him, and that the exemplification of the judgment might be used against his assignees to shew an indebtedness from W. to the plaintiff as assignee of the O'Neill's on a particular account.

2. That the books of T. & R. O'Neill could not be used against either W.'s assignees or H.
3. That the entries in the books of W. were evidence as admissions against his assignees, and as to transactions before 21st March, 1877, against H., to shew the state of the account at the date of the assignment.
4. That the depositions of W. before the Master at Cobourg, like his answer in the suit, could be read against himself, and under the later authorities against H. also.

[December 17th, 1879.—*The Master in Ordinary.*]

The facts appear in the judgment.

Mr. Riordan, for the plaintiff.

Mr. Rae, for defendant Holland.

Mr. Hoyles, for the assignees of Walsh.

THE MASTER IN ORDINARY.—Two merchants carrying on business at Port Hope, as the firm of T. & R. O'Neill, executed two mortgages, dated respectively the 21st of January, 1870, and 13th of March, 1875, in favour of James Walsh. Walsh assigned these mortgages on the 21st of

March, 1877, to Holland, by way of derivative mortgage. The O'Neills, the mortgagors, became insolvent in January, 1877. The plaintiff is the assignee of their estate, and he seeks to redeem these mortgages. Since the decree was made Walsh has also become an insolvent, and the suit has been revived by substituting Picken and Plimsell, his assignees, as defendants in his place.

Holland now claims the amount due on the original mortgages, so far as necessary, to satisfy his derivative mortgage, and the assignees of Walsh claim the remainder. Against the claims made by them the plaintiff has filed two surcharges, which are exactly the same; one against Holland, and the other against Walsh's assignees.

The question now arising is, the admissibility of the evidence offered by the plaintiff in supporting these surcharges.

An action at law was brought in the Court of Common Pleas by the present plaintiff against Walsh, and at the last Spring Assizes for Northumberland and Durham he recovered a verdict for a considerable sum as the unpaid purchase money for goods sold by the O'Neills to Walsh. The plaintiff now puts in, as part of his evidence, a certified copy of the evidence taken at that trial, the judgment of the Court of Common Pleas on a motion for a new trial, and an exemplification of the judgment roll.

I do not see how the evidence taken at the trial can be read here as evidence against Holland. As I understand the rule as to reading in one suit or at one trial evidence taken in another suit or at another trial, the two suits or the two trials must be between the same parties, or if not the second must be between those who represent the former parties, and claim through them by some title acquired subsequently to the first: *Taylor* on Evidence, 7th ed., 467; *Doe v. Derby*, 1 A. & E. 790; and see *Coke v. Fountain*, 1 Vern. 413; *Tucker v. Wilkins*, 4 Jur. 261. Here Holland acquired his interest nearly two years before the action at law, and was no party to it, so as against him the proceedings in that action cannot be admitted as evidence.

Even as against the assignees of Walsh, the evidence cannot be read. To its being read either against them or against Holland there is this objection: to render the depositions admissible it must first be shewn that the witnesses themselves cannot be called. This is clearly the rule at Common Law: *Taylor* on Evidence, 7th ed., ; and the same rule is followed in Equity: *Blagrave v. Blagrave*, 1 De. G. & Sm. 258. That the witnesses cannot be produced has not been shewn here.

The statement in *Daniell's Practice*, p. 1059, that depositions in another case can be received in Chambers without an order, is based on the the case of *Lawrence v. Maule*, 4 Drew 472, but Kindersley, V. C., on page 479, states the general rule there to be, where an issue has been raised between certain parties, and evidence has been adduced upon that issue by one of these parties which could be used by him as against the other party, and in a subsequent proceeding the same issue is raised between the same parties, and the witness who gave the evidence in the former proceeding has died, the Court will admit the evidence given by the deceased witness in the former as evidence in the subsequent proceeding. But the evidence is not admissible unless the issue is the same, and the parties are the same, in both proceedings.

The General Order 175 does not entitle the plaintiff to use these depositions, for that order only enables him to do now, on notice, without an order, what he could formerly have done on obtaining an order. In my opinion, he could not, under the former practice, have read these under the common order. The order under the old form did not give the plaintiff an absolute right to read the depositions. It was, "saving all just exceptions."

The evidence given by Walsh himself at the trial may possibly be received against his assignees as admissions made by him, but that is the utmost extent to which it it can be made use of.

The plaintiff further offers as evidence, without more, the books of T. & R. O'Neill, but these cannot be used as

evidence against either Holland or Walsh's assignees. General Order 228 was referred to by Mr. Riordan as if that order made in every case books *prima facie* evidence of their contents. The order, however, only says that the Master may, if he think fit, direct them to be taken as such. The order is a copy of the last part of section 54 of the Imperial Act 15 & 16 Vic. ch. 86. When such a direction will be made under that section has been discussed in several English cases. It applies simply to cases where the vouchers have been lost and proper legal evidence cannot be given. In *Ewart v. Williams*, 7 D^r G. M. & G. 68, Turner, L. J., said : "This provision of the statute is one which is to be applied with the utmost possible circumspection. It is a provision which empowers this Court to alter the rules of law, and those rules ought not to be departed from except in cases in which the justice of the case renders it necessary to depart from them. If the means exist of proving the items of one account, by independent evidence, I think those means should be applied before the provisions of the statute are called in aid." An order which had been made by Kindersley, V. C., was accordingly discharged, L. J. Turner saying that he was by no means satisfied, from the affidavits, that it was beyond the power of the parties to give sufficient legal evidence. Here no sign even has been made that the plaintiff cannot give such legal evidence. *Lodge v. Prichard*, 3 D. M. & G. 906, was a case of taking partnership accounts and there the partnership books, were, independently of the statute, held, in the absence of fraud, to be evidence for and against all parties.

The plaintiff further puts in the books of James Walsh, produced from the custody of his assignees. The entries in these books are evidence as admissions against Walsh's assignees, and also as to transactions before the 21st of December, 1877, against Holland, to show the state of the account at the date of the assignment. My attention has not, as yet, been called to any particular entries in these books, so I express no opinion as to whether the entries

relied on, standing unexplained by oral evidence, do or do not connect themselves with the mortgages in question, or with something entirely distinct.

The plaintiff also offers as evidence a certified copy of depositions of James Walsh, taken in this suit, before the Master at Cobourg, under the General Orders for the examination of parties before decree. When they were taken the only solicitors present were the solicitors for the plaintiff and for the defendant Walsh.

The depositions of Walsh can no doubt be read against his assignees. The question whether they can be read against Holland depends on whether his answers could be read or not. The examination under the General Orders is the substitute for the discovery which the plaintiff had, under the old system of pleading, to give by his answers to interrogatories in the bill, and on that account the depositions so taken could be read against the defendant examined at the hearing of the cause: *Proctor v. Grant*, 9 Gr. 31; and on a motion for decree: *Mather v. Short*, 14 Gr. 254.

At one time the answer of one defendant could not be read against a co-defendant, and accordingly the examination which could be used as being considered part of the answer, could not be so read either. To use his evidence against a co-defendant it was necessary to call him as a witness. The rule, however, seems now to be somewhat relaxed, and in England the answer of a defendant can, on motion for decree, be read against a co-defendant, notice of the intention so to read it being given: *Stephens v. Heathcote*, 1 Dr. & Sm. 138. And Stuart, V.C., held, in *Ashmall v. Wood*, 3 Jur. N. S., that an answer can be so read on a reference in Chambers under a decree. The head-note in that case speaks of it as "the answer of a deceased defendant," but the fact that the party could not be produced for examination as a witness is not alluded to by the Vice-Chancellor as a reason for his holding that the answer could be read.

The evidence taken on the reference is of course available for the plaintiff.

The result of the whole is, that the evidence of Walsh in the Common Law action can be used as against his assignees or administrators by him, and the exemplification of the judgment may be used as against them to shew an indebtedness from Walsh to the plaintiff as assignee of the O'Neills on a particular account. The books of Walsh may be used against his assignees, and as to entries of transactions before the 21st of March, 1877, against Holland also. The depositions taken at Cobourg, and the evidence taken on the reference, can be used against both Holland and Walsh's assignees.

The other evidence which has been offered cannot be admitted.

The cases to which I was referred by Mr. Riordan do not touch the question now before me. They are all to the effect that an assignee of a mortgage takes it subject to all the equities and to the state of the account between the mortgagor and mortgagee. No one disputes that, but what I have now to consider is the evidence by which the existence of certain equities and the state of the account is proposed to be proved.

COMMON LAW CHAMBERS.

REGINA EX REL HAMILTON V. PIPER.

Assessment—Municipal election—Quo warranto—R. S. O. ch. 180, sec. 57.

E. P. being the lessee of certain premises, he assigned his interest to H. P. after the assessment roll for that year had been returned, with E. P. assessed for the property. No notice of appeal against the assessment was served until several days after the time limited for so doing had expired. The Court of Revision, on appeal, substituted H. P. for E. P. on the roll.

On an application to set aside the election of H. P. as an alderman, on the ground that defendant was not rated on the roll when it was made out, and that he was not sufficiently qualified : *Held*, that the assessment roll was absolutely binding ; and that its correctness could not be tried upon such an application ; and that the want of notice was cured by R. S. O. ch. 180, sec. 53.

[February 3, 1880.—*Mr. Dalton, Q. C.*]
 [February 13, 1880.—*Armour, J.*]

ON the 12th of January, 1880, Henry Esson Hamilton obtained a writ of *quo warranto* to test the election of the respondent, Harry Piper, to the office of alderman for St. John's Ward, in the city of Toronto. The facts of the case appear in the judgment.

Hodgins, Q. C., appeared for the relator.

E. Meek, for the respondent.

MR. DALTON.—In this case there are several points.

1. That as to corrupt practices on the respondent's part was abandoned.
2. As to the majority of the votes which the relator claimed, I believe every one is satisfied that the result of the re-count is to increase the respondent's majority.
3. As to irregularities which have taken place on the

part of some of the deputy returning officers—it is unquestionable that several of these irregularities have been established, but upon the affidavits, and what has taken place before myself, I am of opinion no wrong was intended, and that they are such as have not affected the results of the election, which I think has been substantially conducted on the principles of the Act, and that all is cured by section 168.

There remain two questions as to the qualifications of the respondent, which are really the important questions in the case.

The respondent's qualification is upon land and houses in James street, of which he claims to be lessee by assignment from his brother, Edward Piper. Edward has held a lease from his father for some time past of the property in question, which is now partly in the occupation of sub-tenants. He had lived with his family in one of the houses up to the 1st of May last, and at that time moved to Yorkville. On the 9th of October last, in consideration of \$60, he by deed assigned his interest to the respondent, his brother. Now, the account given of the transaction by the respondent is, that having been some time out of business, he early in the summer, previous to July, formed the idea of carrying on business as a horse dealer here, for which these premises, having a good deal of accommodation in stabling, would be suitable; and that after previous talk on the subject the brothers agreed on the 12th of July last, of which both made a memorandum, that the respondent should have an assignment of the lease, for which he was to pay \$60, more being charged, it would seem, on account of the inconvenience to Edward in moving the material of his business, of which a good deal was stored there, than from the value there was on the premises beyond the rent of \$650, payable to the head landlord. This was not carried out formally until the 9th of October, when the assignment was executed and the consideration of \$60 paid. But before that formal execution, Edward had removed the principal part of his goods from the premises—as is sworn

—some to Yorkville and some to his store on Yonge street. At the time of the assignment the tenants were notified of it, but the occupation of the premises by the respondent has been at all times since the agreement to a very small extent. He has kept a horse and sleigh there—several horses, as stated, at different times—and some such acts, but it is certain that he has never commenced the business there for which he alleges he took the lease. The tenants in occupation have paid the rent to Edward. As to one of them, Colville, he has made several payments, and for the last two Edward gave him a receipt in the respondents' name. Only the last of these payments would belong to respondent, and the other tenant has paid Edward, and both have been credited in Edward's books. The assignment to the respondent is not mentioned in the books, nor is the receipt of the \$60 consideration money.

It is objected that these facts shew a pretended, and not a real transaction between the parties, designed, it is suggested, to furnish a qualification to the respondent, and it is relied on that there has been no substantial change in the possession; that the payments have been made to Edward as before the assignment, and as they would have continued to be made if the assignment had not been at all; that there is no entry of the assignment in the books nor of the receipt of the \$60, and that everything seems to have gone on as though the property still remained in Edward.

To all this it is answered, that upon the agreement being made Edward did move out his goods, except a small part of them long before the 9th of October, and that neither the assignment nor the receipt of the \$60 should be entered in Edward's books, which relate to his business and not to such transactions. That since the respondent first formed the intention of carrying on a "trading in horses," he had been appointed to a clerkship in the office of the Surveyor of Weights and Measures. It seems he was appointed in August. He had not previously to that time carried out his intention as to the business, as he had been disap-

pointed in receiving assistance in money which he had expected. He had, in fact, been in possession of the premises, so far as he required them up to that time, by keeping his horses there. After the fire at his brother's place in Yonge street, it is stated, it became highly desirable for his brother's business that he should move his workmen and goods into the premises, and that accordingly Edward applied to the respondent for that purpose, and that they then agreed that Edward should so temporarily occupy the premises, which he did accordingly, and that Edward should in the meantime receive and pay the rent and pay the taxes, and should allow the respondent a proper amount for the occupation while it should be necessary to him, Edward ; and that the account should be settled between the brothers when Edward got his insurance. This arrangement commenced in the middle of September, just after the fire, and therefore when the parties were under the first arrangement made in July—the formal assignment not having been made till the 8th of October.

The question is here, was this a real transaction, or merely a simulated one ? Did the parties intend that the lease should be really assigned, or did they intend that it should still remain Edward's property ? We have first the oaths of both the parties, very distinctly given, that the transaction was meant to be exactly what it purports to be on its face, and that the consideration was paid and received. Then it does not seem improbable that a young man, some time out of business, should look about for some line to start in. But then Edward continued to receive the rents and to enter the payments in his books as before, and he paid the taxes. Then, are these circumstances sufficiently explained by the second arrangement between the brothers after the fire ? To me that arrangement seems not otherwise than natural. We all know that the fire did take place, and that the brothers should make such an agreement under all the circumstances then existing, seems probable. They both distinctly swear that they did so, and the explanations seem to me sufficient—so I

conclude that the respondent had a qualification : in fact I cannot see how any other conclusion could be justified.

It is then objected that the alteration on the roll from Edward Piper to the respondent by the Court of Revision is unauthorized and void, and the assessment still remains to Edward Piper as at first. The important facts as to this are as follows:—The assignment from Edward to the respondent was made on the 9th of October; the assessment roll (the last revised) was returnable and returned on the 1st of October, 1879, and on it Edward Piper was assessed as owner of 24 James street, the land in question. The 15th of October was the last day for giving notice of an intended appeal. No notice was given at that time or for several days after. It was not given until the Court of Revision was sitting, when a notice was given. The appeal was not, therefore, put on the list of appeals for the Court of Revision, prepared by the clerk under the statute. Neither were some fifty or sixty other late appeals for the same ward put upon the list. This notice of appeal was tied in a bundle with the other late appeals, and in that shape only all those late appeals were before the Court. Mr. Edward Piper and the respondent, with their attorney, appeared before the Court on the 10th of November. They had with them the lease and the assignment from Edward to the respondent, and having explained the circumstances of the transfer from Edward to the respondent, the Court, having first sworn one of the parties to the facts, on the 10th of November granted the appeal, and caused the clerk to strike from the roll the name of Edward, and to insert the respondent as owner of the land assessed. I believe I have stated all the facts that are really important in considering the point, though some other details were given in evidence. The Pipers had no doubt on the 9th filled up and instructed their attorney to give the notice of appeal, which, from mistake, was really not then given, but this seems unimportant on the question of law, as that notice was never given.

Upon this, Mr. Hodgins objected that the proposed alter-

ation in the assessment was never really made in point of law—that the act of the Court of Revision not being founded on a notice of appeal given within the time mentioned in the statute, was entirely void, and left the assessment still against Edward as at first—that the very first condition of jurisdiction was wanting, and the act of the Court of Revision therefore of no avail. Mr. Hodgins addressed to me an argument on this matter, dealing with the principles of the common law—a very learned argument, if I may be permitted to say so. And although it seems to me that it may be possible to support the act of the Court of Revision without the aid of the 57th section of the statute, notwithstanding what has been urged, yet I shall not pursue the subject here, because I think that that section as now amended makes good the act of the Court of Revision, and supersedes all argument whatever. The substratum of that section has been in force now a quarter of a century and we are not without cases to limit its true effect in the past; but it seems to me there is great significance in the words which have lately been added at the end, which very much enlarge the scope of the whole clause. The clause now establishes the roll as passed by the Court of Revision, notwithstanding “any defect or error committed in regard to such roll, or *any defect, error, or misstatement in the notice required by sec. 41 of the Act, or the omission to deliver or transmit such notice.*” The words I have underlined are the amendment lately added, and seem to me now to give the meaning of the words, “defect or error,” and to furnish the key to the construction of the whole clause. The clause cures any error, and gives an instance within the category of an omission declared to be within the saving—perhaps as vital as anything that can be imagined. The notice required by section 41 is nothing less than the original notice of assessment, which lies at the foundation of the whole proceeding. Now, I take it, that the only enquiry on the point is, what is the intention of the Legislature: and how can it be said that any omission is too important

to come within the meaning of the clause, and to be declared an error against which the clause will not save, when even this omission of the notice of assessment—which lies at the foundation of the assessment itself—is expressly cured?

The notice of the appeal in question here is of small importance compared with the notice of the assessment itself, and though I think not absolutely so, yet it is by such comparison more like procedure, and I am therefore strongly of the opinion that the delay which occurred in giving the notice of appeal is cured by this section 57, and that, consequently, the act of the Court of Revision was effectual to transfer the assessment to the respondent.

I may add—not that I suppose it can affect the law, but as a matter that I had curiosity about—that it is quite usual for our Court of Revision to take up cases where the notice of appeal is too late. This I have learned by enquiry from the Clerk of the City Council.

Judgment for the respondent, with costs.

From this judgment the relator appealed. The appeal was argued before Armour, J., on the 10th of February, 1880, the same counsel being engaged.

ARMOUR, J.—It is unnecessary for me to determine the point whether I have jurisdiction to entertain the appeal from Mr. Dalton, owing to the conclusion I have come to on the legal questions involved. The application comes to me on the one point, that the respondent's name was not on the assessment roll at the time the notice of assessment was given by the city clerk, and that it was not legally placed there afterwards. Section 70 R. S. O., ch. 174, sets out the property qualification required by persons seeking election as aldermen of a municipality, as follows:

“And have at the time of the election in their own right, or in the rights of their wives as proprietors or

tenants, a legal or equitable freehold or leasehold, or partly freehold and partly leasehold, or partly legal and partly equitable, rated in their own names on the last revised assessment roll of the municipality to at least the value following : In cities, freehold to one thousand five hundred dollars, or leasehold to three thousand dollars."

The respondent appears on the assessment roll of the city, rated as the proprietor of an estate sufficient to qualify him to be elected as an alderman of the city. It must be proved that he has such an estate, in fact, to give him the qualification for the position of alderman. The question raised by the relator is, that the respondent's name was placed upon the assessment roll of the city by an entirely illegal and void process. The facts appear to be that on 1st October, 1879, when the assessment roll was returned, the name of Edward Piper appeared rated in respect of the property on which respondent now seeks to qualify.

On 9th October, Edward Piper transferred the property to Harry Piper by assignment of lease. On 10th November Edward Piper and the respondent went before the Court of Revision, and filed a notice that the property had been changed, and asked that the name of Edward Piper might be erased from the assessment, and the name of Harry Piper inserted in lieu thereof, in respect of the said property. The Court of Revision made the change, so that at the time of the election the respondent's name appeared on the assessment roll in respect of the property.

The relator contends, that as the proper notice required by sec. 56 R. S. O. ch. 180, had not been given, the case must be treated as if the name of Edward Piper was on the roll at the time of the election, instead of that of the respondent. It is clear that the name of Edward Piper was upon the roll at the time of the assessment, and at that time no one else should have been on the roll to comply with the law, so that there was no necessity to give the notice required by the Assessment Act.

Subsec. 18 of sec. 56 R. S. O. ch. 180, provides as follows : "Where it appears that there are palpable errors

which need correction, the Court may extend the time of making complaints ten days further, and may then meet and determine the additional matters complained of, and the assessor may, for such purpose, be the complainant." I do not think that this covers the present case.

Section 53 of the same chapter defines the jurisdiction of the Court of Revision, and provides as follows : "At the time or times appointed, the Court shall meet and try all complaints in regard to persons wrongfully placed on or omitted from the roll, or assessed at too high or too low a sum."

Taking the facts, with the provisions of the statute, I see no foundation for any notice as required by the assessment law. Now, had the relator set forth in his statement as a specific ground of objection to the respondent's qualification, that the Court of Revision had no power to make the change on the Assessment Roll, under the circumstances, it must have been held that the Court of Revision had no power to do so. Instances have been known where the transferor and transferee have gone before the Court of Revision after the time, and had the names changed, in cases where the transferor and transferee were the only parties interested. The assessment law makes no provision for such cases. In this case it is not asked that the Court of Revision be prevented and prohibited from making the change of names on the assessment roll. Had it been, I would have dealt with the case as in the case of *Tobey v. Wilson*, 43 Q. B. 230. The position would then have been entirely changed. The question now is : Can I, upon this application, do anything to affect the roll of the Court of Revision ? I think I can not. The statement of the plaintiff does not charge the alteration of the roll. It only charges that the defendant was not rated upon the assessment roll at the time that it was made out, and that he is not sufficiently qualified to become an alderman of the city. The statement does not attack the defendant for the way he got on the roll, or attack him that he was, or was not on the roll. Sec. 57 ch. 180 R. S. O., cures any flaw that may be upon the roll. It says :

"The roll as finally passed by the Court, and certified by the clerk as passed, shall, except in so far as the same may be further amended on appeal to the Judge of the Council Court, be valid, and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, or any defect, error, or misstatement in the notice required by section 41 of this Act, or the omission to deliver or transmit such notice."

This makes the roll absolutely binding and prevents the relator from going behind the roll. I must hold that the defendant, Piper, was properly and sufficiently rated to qualify him as an alderman, and I therefore dismiss the appeal, with costs.

CLARKE V. FARRELL.

Interpleader—Sheriff—Laches.

At the instance of a sheriff, an interpleader order was granted and issues tried to determine the rights of certain claimants to goods seized by him in execution. Previously to the order being granted, the landlord of the premises laid claim to the goods, which claim the sheriff did not mention when applying for the order.

Held, that after the trial of the issues, the sheriff was not entitled to a second interpleader to test the landlord's claim, as this should have been disposed of on the first application.

[February 25, 1880—Mr. Dalton, Q.C.]

THIS was an interpleader application for the sheriff of Hastings. The sheriff seized the goods under the plaintiff's execution in April, 1879. On 12th May, following, he obtained an interpleader summons, three claimants to the ownership of the goods having appeared. On 10th May, the landlord of the premises upon which the goods were when seized, had served the sheriff with a notice that he also claimed the goods; but no attention was paid to this latter claim, and an order was made directing three separate interpleader issues to try the titles of the first three claimants who had appeared. These issues were tried and determined in favour of the claimants, and the verdicts were subsequently confirmed in Michaelmas term following: see *Severn v. Clarke, Corby v. Clarke*, 30 C. P. 363.

In the meantime the goods had been sold, and the sheriff had remained in possession of the money until 18th February, 1880, when he obtained another interpleader summons to try the right of the landlord to the money in his hands.

Crickmore and *Ogden*, for the claimants, opposed the application, contending that the sheriff had, by his conduct in remaining silent as to the landlord's claim until the present stage of the proceedings, debarred himself of any right to interplead.

Clarke appeared for the landlord. *Aylesworth*, for the sheriff, supported the summons.

MR. DALTON.—When the circumstances of this case are considered, it seems to me quite impossible, from the known practice in interpleader, and from every case that bears upon the subject, that the sheriff's application can be granted. Two days before the interpleader summons had been made, he was aware of this new claim by the landlord, yet he lay by and allowed proceedings to go on, ignoring the landlord's claim altogether. After a long litigation, in which the claimants have succeeded against the execution creditor, he seeks now to have the parties interplead as to the landlord's claim. Supposing the mere lapse of time to be got over, which, according to the practice, cannot be, without violating well established rules—yet, in this case there are circumstances which would render it highly injurious to the claimants and the execution creditor; for they have proceeded and litigated as though there were no claim by the landlord. It would be an extraordinary thing that the successful party in that litigation should be called upon to fight it over again with the landlord, upon a claim which had existed from the beginning, when, had they known of it, they might never have litigated at all. This, indeed, seems highly probable, if the landlord's claim be well founded.

I discharge the sheriff's application, with costs of all parties except those of the landlord.

BANK OF MONTREAL V. FOULDS ET AL.

Term's notice to proceed—Side-bar rule—Discontinuance.

Issuing a side-bar rule to discontinue the action is not a proceeding within the meaning of the rule which requires a term's notice of plaintiffs' intention to proceed, where no proceeding has been taken in the cause for a year.

[March 12, 1880.—*Osler, J.*]

No step had been taken in this cause for more than a year, and the plaintiffs then took out a side-bar rule to discontinue the action. The defendant thereupon obtained a summons to set aside the rule, on the ground that no proceeding had been taken in the cause for more than a year, and that a term's notice of the plaintiffs' intention to proceed was therefore necessary.

Worrell shewed cause.

Ogden supported the summons.

OSLER, J., held that the issuing of a side-bar rule to discontinue the action is not a proceeding within the meaning of the rule stated in *Tyre v. Wilkes*, 2 P. R. 265, which requires a term's notice of plaintiff's intention to proceed, where no proceedings have been taken for a year (*a*).

Summons discharged.

(*a*) See S. C. 182.

GOLDING V. MACKIE.

Ca. sa.—Render by bail—Supersedeas—Discharge—Reg. Gen. H. T. 26 Geo. III.

The defendant was arrested under a *ca. sa.* and afterwards admitted to bail. The trial was in the vacation before Michaelmas Term, and the render in the vacation after that term. The plaintiff having omitted to charge the defendant in execution during Hilary Term:

Held, on an application for a *supersedeas*, that the render in Michaelmas vacation related back to the preceding term, which should count as one of the two terms within which the plaintiff must charge the defendant in execution, under *Reg. Gen. H. T. 26 Geo. III.* The defendant was therefore discharged.

[March 12, 1880.—*Osler, J.*]

THE defendant was arrested on a *ca. sa.* on the 13th of April, 1879, and shortly thereafter gave bail to the action.

In the vacation after Trinity Term, namely, in October, 1879, the cause was tried, and the plaintiff had a verdict, the defendant then being out on bail.

In the vacation after Michaelmas Term, namely, on the 18th of December, 1879, the defendant was rendered in discharge of his bail, and notice of the render was duly given.

On the 17th of February, 1880, after the expiration of Hilary Term, the plaintiff not having charged the defendant in execution or signed judgment, the present application was made for a *supersedeas*.

J. B. Clarke shewed cause.

G. D. Dickson in support of the rule.

March 12, 1880. OSLER, J., sitting for the full Court in vacation. The defendant not having been a prisoner at the time of the trial, he is not supersedeable under our Rule 99, T. T. 1856: *Curry v. Turner*, 3 Pr. 144. The rule applicable to his case is that of H. T. 26 Geo. III.: *Brash v. Latta*, 5 U. C. L. J. 226. The part of that rule which is important here is as follows: "In case of a surrender in discharge of bail, after a trial or final judgment obtained, unless the plaintiff shall cause the defendant to be charged in execution within two terms next after such

surrender and due notice thereof, of which two terms the term wherein such surrender shall be made shall be taken as one, the prisoner shall be discharged out of custody by *supersedeas*." *Peacock's Rules K. B.* (1811), p. 158.

It was argued that the render having been made in vacation after Michaelmas Term, it could not now, by analogy, have relation back to that term, because the practice as to judgments signed in vacation having relation back to the preceding term, was done away with by our Rule 47 T. T. 1856, the origin of which was the English Rule of H. T. 4 Wm. IV., 5 B. & Ad. ii.

In *Smith v. Jefferys*, 6 T. R. 776, it was held, as pointed out by the Court in *Thorn v. Leslie*, 8 A. & E. 195, under the rule of 26 Geo. III., that where the trial was in vacation, and the render afterwards in the same vacation, the plaintiff had the two following terms in which to charge the defendant in execution. The render was not allowed to relate back to a term preceding the trial. Had the surrender taken place in the vacation after the term succeeding the trial, I infer that such term would then, by relation, have counted as one of the terms mentioned in the rule. See *Brown v. Gardner*, 1 Dowl. P. C. 426.

In *Thorn v. Leslie*, 8 A. & E. 195, decided in Easter Term, 1838, more than four years after the rule of H. T. 4 Wm. IV., abolishing the relation of judgments to terms, the question was whether a render in vacation had relation back to the preceding term. The render was made in the vacation of the Michaelmas Term, 1837, and judgment had been signed in Michaelmas Term, 1836. Counsel contended that as judgments must be dated on the day on which they are signed, the same rule by analogy would apply to a render, and *Smith v. Jefferys*, 6 T. R. 776, was cited as shewing that the render in vacation did not relate back. The true effect of that decision was pointed out by the Court, and Patteson, J., said: "Here the judgment is signed of a term *earlier* than that preceding the vacation in which the render is made; must not the render be considered to be as of Michaelmas Term, 1837?"

Littledale, J., said: "The judgment was signed a year before the render. Then has the prisoner been in custody for two terms? That depends upon the question whether the render relates back to the term preceding the vacation in which it is made. By the practice it does so relate when the judgment *is of an earlier term*. We cannot extend the rule, as to dating judgments from the day on which they are signed, to the render." Patteson, J.—"The rule as to the relation of the render is decisive unless the new rules have made any alteration. Mr. Wordsworth cites no authority to shew that they have, but he relies on the analogy of the judgment being no longer allowed to have relation. That argument I cannot accede to. *Smith v. Jefferys* shews merely that if the trial be in a vacation and the render afterwards in the same vacation, the plaintiff has the two following terms. It does not apply here."

Calbron v. Hall, 5 Dowl. P. C. 534, only decided that a judgment signed in vacation had no relation back to the preceding term after the rule abolishing the relation of judgment to term.

Reid v. Drake, 4 Pr. R. 141, does not touch the point. It merely shews that the vacation succeeding the term is not part of the term for the purpose of charging the defendant: See *Torrance v. Halden*, 10 U. C. L. J. 332. The render was on 21st July, in the vacation after Easter Term, judgment having been signed in the vacation after the preceding Michaelmas Term. It was held that the render had relation back to Easter Term, so that the defendant became supersedeable after Trinity Term.

It appears, therefore, notwithstanding the new rules, that by the practice a render in vacation does still relate back to the preceding term when the effect of doing so is not to alter the relation of the verdict or judgment, *i. e.*, when the verdict or judgment is of an earlier term than the one preceding the render.

In *Brash v. Latta*, already referred to, the trial and subsequent render were, as in *Smith v. Jefferys*, in the same vacation. The head-note is inaccurate. Although there is a

useful discussion of the cases, the only point decided is that notice of the render should have been given. I do not rely upon *Borer v. Baker*, 1 A. & E. 860, 2 Dowl. P. C. 608, for that case was held in *Thorn v. Leslie*, 8 A. & E. 195, not to be of general application, and I infer from his remarks that Richards, J., would not have acted upon it in *Brash v. Latta*, had he found it necessary to decide whether the prisoner was supersedeable.

In the present case the trial was in the vacation before Michaelmas Term, and the render was made in the vacation after that term. I am of opinion that by the practice the render has relation back to that term, so that it counts as one of the two terms within which by the rule of 26 Geo. III. the plaintiff was bound to charge the defendant in execution after the trial. Not having been charged in execution in Hilary Term, the defendant is now supersedeable and entitled to his discharge. It is not necessary to refer to the other grounds on which the defendant moved to be discharged out of custody.

Rule absolute.

REGINA EX REL. McDONALD V. ANDERSON.

Quo warranto—Municipal election—Reg. Gen. 1, M. T. 14 Vic.

A County Court Judge has power to grant a *fiat* in Term time for the issue of a writ of *quo warranto* to try a contested municipal election.
Held, that Rule 1, M. T. 14 Vic., has become inoperative by the effect of subsequent statutory enactments, to which it is repugnant.

March 12, 1880.—*Osler, J.*

A summons was obtained by the respondent in this matter calling upon the relator to shew cause why the writ of *quo warranto* should not be set aside, on the ground that the junior Judge of the County Court of the County of Wellington, on whose *fiat* the writ was issued, had no jurisdiction to make said *fiat* during term time, and that the writ having been issued on the *fiat* of the Judge only, instead of upon a rule of the Court in term, it was issued without any judicial authority therefor.

From the affidavits filed, it appeared that the writ was issued in Hilary Term, on the 13th of February, 1880, from the office of the Deputy Clerk of the Crown for the county of Wellington, on a *fiat* bearing the same date, made by the junior Judge of the County Court of that county. The writ was made returnable before the learned Judge himself.

Holman, shewed cause.

Aylesworth, supported the summons.

OSLER, J.—The objection taken to the *fiat* and writ was, that by force of the Rules of Court of M. T. 14 Vict., for the trial of contested elections, Rule 1, the *fiat* for the writ could, in term time, be made only by Rule of one of the Courts of Queen's Bench or Common Pleas.

It appears to me that if the provisions of the several statutes which have been passed from time to time on the subject are examined, the question will be found to be free from any reasonable doubt. The first Act was 12 Vict. ch. 81, which provided (section 146), “That at the instance of any relator having an interest as a candidate or voter * *

a writ of summons in the nature of a *quo warranto* shall lie to try the validity of such election, which writ shall issue out of Her Majesty's Court of Queen's Bench * * upon an order of that Court in term time, or upon a *fiat* of a Judge thereof in vacation, upon such relator shewing to such Court or Judge reasonable grounds," &c.

This section was amended by 13 & 14 Vict. ch. 64, Sched. A, No. 23, the Court of Common Pleas having in the meantime been established. It provided that the writ should issue out of either of Her Majesty's Superior Courts of Common Law at Toronto, upon an order of such Court in term time, or upon a *fiat* of a Judge thereof in vacation.

By section 153 of the 12 Vict. ch. 81, as amended by the 13 & 14 Vict. ch. 64, Schedule A., the Courts of Queen's Bench and Common Pleas were empowered "to make rules to regulate the practice respecting the suing out, service, and execution of the writ of summons, * * and generally for the regulation of the practice, as well at Chambers as in *Banc*, in hearing and determining the validity of elections, and from time to time to make rules to rescind, alter, or amend the former rules, in like manner as they are by law empowered to do for the regulation of the practice of the Courts in matters within their ordinary jurisdiction."

The existing Rules were made in Michaelmas Term, 14 Victoria. Rule 1, provides that the relator entitled to complain of any election shall in person or by attorney by written notice, apply to one of the Courts of Queen's Bench or Common Pleas in term time, or to the Judge presiding in Chambers in vacation, for a writ of summons in the nature of a *quo warranto*.

By the 16 Vict. ch. 181, sec. 1, the 146th section of the Act of 1849, as amended, was repealed, and by section 27, a new section substituted therefor, which so far as material to the present question provided, "That at the instance of any relator * * a writ of summons in the nature of a *quo warranto* shall lie, * * which writ shall issue out of either of Her Majesty's Superior Courts

of Common Law at Toronto, upon an order of such Court in term time, or upon the fiat of a Judge of either of such Courts, or of the Judge of the County Court, having jurisdiction in the municipality within which such election shall have taken place, in vacation, upon such relator shewing upon affidavit * * reasonable grounds, * * and upon entering into a recognizance * * to prosecute with effect the writ to be issued upon such order or fiat, * * thereupon such writ shall be issued out of the office of the Clerk of the Crown and Pleas of either of the Superior Courts of Common Law, at Toronto, and out of the offices of their deputies, and shall be returnable before some one of the Judges of either of the said Courts at Chambers, or before the Judge of such County Court, at a place to be mentioned in the writ, any one of which Judges shall have power to hear and determine the validity of the election complained against."

Then came the Municipal Institutions Act of 1858, 22 Vic. ch. 99, by which the former Acts were repealed. Section 127 enacted that the validity of the election might be tried in term or vacation by a Judge of either of the superior Courts of Common Law or the senior or officiating Judge of the County Court of the county in which the election took place. Sec. 128 provided for the proceedings for the trial—(1) within a limited time and upon certain facts being shewn by affidavit to such Judge, "the Judge shall direct a writ of summons in the nature of a quo warranto to be issued to try the validity of the election." By sub-sec. 5 the writ was to be issued by the Clerk of the Process at Toronto, or by the Deputy Clerk of the Crown of the county in which the election took place, returnable before a Judge in Chambers at Toronto, or before the Judge of the County Court at a place named in the writ. Sub-sec. 18 empowered the Judges of the Superior Courts of Common Law to make rules to regulate practice, settle forms of writs, &c., and provided that all existing rules were to remain in force until rescinded or altered.

These sections are substantially the same as the corres-

ponding sections of Consol. Stat. U. C. ch. 54, "An Act respecting the Municipal Institutions of Upper Canada."

The Municipal Institutions Act of 1866, 29 & 30 Vic. ch. 51, secs. 130 and 131, sub-secs. 1, 2, 18, were substantially the same as those of the Consol. Stat. U. C. ch. 54, just referred to. The Municipal Act of 1873, 36 Vic. ch. 48, secs. 131, 132, 137, 152, made no change in the procedure, and continued the existing rules in force until rescinded or altered.

The Act now in force is Rev. Stat. Ont. ch. 174, of which sections 179, 180, 185, and 200 correspond with the above sections of the Act of 1873.

The Rules of Court, it will be seen, were made at a time when the County Court Judge had no jurisdiction to grant a *fiat* or try the election, a jurisdiction which was first conferred upon him by 16 Vict. ch. 181. The 12 Vict. ch. 81 as amended, expressly provided that the writ should issue out of the Court of Queen's Bench or Common Pleas upon an order of the *Court* in term time, or upon a *fiat of a Judge* of one of the said Courts in Vacation. And the 16 Vict. ch. 181 placed the County Judge in the position of a Judge of the Superior Courts as regarded his power to issue a *fiat*, and provided as before that in term time the writ should issue upon an order of the Court, but in vacation upon the *fiat* of a Judge of either of the Superior Courts of Common Law or of the Judge of the County Court. The Rule of Court was not then inconsistent with the statute, for, as I have said, the latter expressly enacted that in term time the order for the issue of the writ must be made by the Court. And it was upon this statute 16 Vict. ch. 181 sec. 27, that the case of *Regina ex rel. Gleeson v. Horsman*, 13 U.C.R. 140; strongly relied upon by the defendant in this case, was decided, and the order made in term by the Judge of the County Court set aside; Draper, J., observing that the language of the Act appeared too clear to admit of any argument.

The language of the Consolidated Statute (Consol. Stat. U. C. ch. 54) is very different. Instead of keeping up the

distinction between term and vacation as to procedure to be observed in applying for the order, it enacts that the validity of the election may be tried in term or vacation by a Judge of the Superior Court or of the County Court, and that "such Judge," upon a proper case made out, "shall direct a writ of summons in the nature of a *quo warranto* to be issued." The County Court Judge, so far as regards his power to direct the issue of the writ within his own county, is thus placed in all respects in the position of a Judge of one of the Superior Courts; and, without any distinction between Term and Vacation, it is a Judge, and not, in any case, the Court, who is to direct the issue of the writ. The rule is entirely repugnant to the statute in this respect,—that while by the latter the County Judge within his county may, at any time within the prescribed time, make the order for the writ, the former would restrain him, as well as the Judges of the Superior Courts, from doing so during term.

The rule, in short, by the course of legislation, has become entirely inoperative and inapplicable to the existing state of the law. As Jessel, M. R., said in *Ex parte Davis*, L. R. 7 Ch. App., at p. 529, referred to in *Hardcastle* on Statutory Law, p. 152: "The Act of Parliament is plain, and the rule must be interpreted so as to be reconciled with it, or if it cannot be reconciled the rule must give way to the plain terms of the Act." And in *Irving v. Askew*, L. R. 5 Q. B., at p. 211, per Hannen, J., "if the rule were really repugnant to the Act of Parliament, I should think the rule, though made under the powers of the Act, would not override its enactments." As to the effect of a discrepancy between the statute and a schedule, see *Regina v. Bains*, 12 A. & E. 227.

Unless I am constrained by authority or the plain words of the Act, I should not give effect to the defendant's contention. To do so would be to introduce a senseless and inconvenient practice, and one, in my humble opinion, never contemplated by the statute. The summons must be discharged, with costs (a).

(a) This judgment was affirmed by the full Court of Queen's Bench, in Easter Term following.

IMPERIAL BANK v. DICKEY.

Ca. sa.—Judgment debtor—Service—Costs.

When serving a defendant with an order to examine him as a judgment debtor, it is not necessary to exhibit the original order, unless demanded, in order to entitle the plaintiff to move for a *ca. sa.* against him, under R. S. O., ch. 50, sec. 305.

Where a judgment debtor disobeyed an order for his examination, he was directed to pay the costs of an application for a *ca. sa.*, although the motion was dismissed upon his giving a sufficient excuse for his disobedience.

[March 23, 1880.—*Galt, J.*]

The plaintiffs, who had recovered judgment against the defendant, obtained an order to examine him as a judgment debtor, and caused a copy of the same to be served upon him. At the time of serving him the original was not shown to him. The defendant did not appear at the time and place appointed for his examination, and the plaintiffs thereupon obtained a summons under R. S. O., ch. 50, sec. 305, for a writ of *capias ad satisfaciendum* to issue against him.

Holman, for defendant, contended, on the return of the summons, that as defendant was liable to be committed for non-compliance with the order to examine him, the original order should have been exhibited to him when the service was made. This it was proved had not been done. He likened the case to one in which disobedience is treated as a contempt of Court, for which the defendant might be attached. He cited *Wadsworth v. Marshall*, 1 C. & M. 87; *Pritchett v. King*, 14 L. J. N. S. 99,

Shepley, supported the summons. Under Reg. Gen. 134, 1856, it is not necessary to show the original when service is effected, except in cases of attachment. The common law remedy of attachment for contempt is not sought here. The motion is for a *ca. sa.*, under the R. S. O., ch. 50, sec. 305. Even assuming that the rule of Court makes it necessary to show the original summons when service is effected, it can only apply to the summons upon which the

order to commit, or for a *ca. sa.*, was issued, and not to the original order upon which default was made.

GALT, J.—There is no doubt that in cases where it is sought to punish the defendant as for contempt by attachment, it is necessary the original order should be shown to him at the time of service. It appears to me, however, such a rule is not applicable to a case like the present. This is not an application to commit the defendant for contempt, but for the issue of a *ca. sa.* It is true such a proceeding involves the imprisonment of the defendant, but such imprisonment is not the same as a committal for contempt, in which latter case the defendant cannot discharge himself as he can under a *ca. sa.*, by satisfying the debt.

This, however, is not the reason why in a case under the 305th section, it is not necessary to exhibit the original order unless demanded by defendant. By rule 134 it is expressly declared that it shall not be necessary to the regular service of a rule or order that the original rule or order shall be shewn unless sight thereof be demanded, except in cases of attachment. The object of the Legislature was to compel the defendant to make an honest and true disclosure of his estate and effects, and it would be a singular state of the law, if after a defendant has appeared on such an order, and we will suppose had refused to make any disclosure, or had under oath shewn he had been guilty of gross fraud, he could, when called upon to shew cause why he should not be committed to gaol under the 305th section, say that he was not amenable, because at the time he was served with the copy of the order for his attendance to be examined the original was not shewn to him, although he did not demand to see it. The proceedings under the section appear to me to have been intended as a punishment for dishonest conduct on the part of a defendant, and not as a proceeding for attachment as for a contempt. It must be borne in mind that when a party is in contempt, he can at any time apply for his release

upon satisfying the Court, but I do not see how the Court could interfere to discharge a man from custody, who had been sentenced to a specific term of imprisonment for dishonest conduct. In my judgment, it is not necessary to exhibit the original order, unless demanded, in proceedings under the 305th section; consequently, the defendant must pay the costs of this application. In the foregoing observations I have not intended to reflect in any manner on the conduct of this defendant, because I had already decided not to grant the *ca. sa.*, on the statements made to me on the return of the summons, as I was satisfied with the explanation offered, but the question of the costs of the application was to stand over until I considered the necessity of exhibiting the original order. As I am of opinion it was not necessary, the costs of the summons must be paid by defendant.

Summons discharged.

COOPER v. KIRKPATRICK.

Insolvent plaintiff—Security for costs.

The repeal of the Insolvent Act does not affect any insolvent whose estate has vested in the assignee prior to the repeal.

[April 21, 1880.—Mr. Dalton, Q.C.]

Holman moved absolute a summons for security for costs, on the ground that the plaintiff was an undischarged insolvent.

Aylesworth shewed cause, and contended that as the right to security was created by sec. 39 of the Insolvent Act, since the repeal of that Act such right was gone.

MR. DALTON held that under the proviso in the repealing Act, the repeal of the Act did not affect any insolvent whose estate had vested in the assignee prior to the repealing Act coming into force.

Order made for security.

VOGT v. BOYLE.

County Court—Jurisdiction—Prohibition—Liquidated and unliquidated claim.

A County Court has jurisdiction to try a claim up to \$400, which is made up of an unliquidated amount of less than \$200, and the balance of a liquidated amount.

[April 27, 1880.—*Hagarty, C. J.*]

The plaintiff sued the defendant in the County Court of Bruce for \$276, being made up of the amount of a due bill for \$205, and an open account for \$71. At the trial, the Judge held that he had not jurisdiction to try a claim over \$200, which was partly liquidated and partly unliquidated. The plaintiff thereupon abandoned the \$71 claim, amending his particulars, and judgment was entered for him for \$205.

H. J. Scott, for the defendant, then moved for a prohibition to the County Court, on the ground that the Judge had no power to allow the plaintiff to abandon a portion of his claim at the trial, by amending the particulars.

Cassidy (McCarthy, Hoskin, Plumb & Creelman) shewed cause.

HAGARTY, C. J.—I am strongly of opinion that the County Court has jurisdiction to try a case when there may be, say \$300, of a liquidated claim; and in addition, say \$99, on an open, unsettled account. The statute gives a general jurisdiction up to \$200, liquidated or unliquidated and up to \$400 when the amount is liquidated. This, in my opinion, gives jurisdiction in the case first above mentioned. I have so decided many years ago, and, I think, so have other Judges. See *Jordan v. Marr*, 4 U. C. R. 53.

Summons discharged.

SHELLY V. HUSSEY.

Examination of parties—Verdict—Effect of on order to examine.

Where an order to examine a party to a suit has been granted before the trial, such examination cannot be had after the trial has taken place; and it was so held where the verdict rendered at the trial was a nominal verdict only, subject to a reference to arbitration.

[April 30, 1880.—Mr. Dalton, Q. C.]

Aylesworth obtained a summons under 41 Vic., ch. 8, sec. 9, O., to strike out defendant's defence for non-compliance with an order for his examination.

It appeared that an order to examine defendant pursuant to R. S. O., ch. 50, sec. 156, had been made in Chambers on the 12th of March, 1880, and an appointment obtained from the examiners named in the order for the "second day after the day of service."

The order and appointment were not served on the defendant until the 23rd of March, which day was the commission day for the assizes, at which the case was entered for trial.

On the 24th of March the cause was disposed of at the assizes by the entry of a nominal verdict for the plaintiff, subject to the award of an arbitrator.

Holman shewed cause and objected:—1. That no place was mentioned in the appointment for the examination. 2. That the defendant could not be examined out of his own county. 3. That the case having come on for trial, and a verdict rendered before the time appointed for the examination, an examination could not be had under this order. This remedy of striking out the pleas could not be resorted to under the present circumstances, where the Court itself had tried the case and adjudicated upon it by giving a verdict for the plaintiff. He cited: *McDermid v. McDermid*, 2 Chy. Ch. 372; *Gallagher v. Gairdner*, 2 Chy. Ch. 480; *McMurray v. Grand Trunk R. W. Co.*, 3 Chy. Ch. 130.

Aylesworth, supported the summons. The strict letter of sec. 156 of the R. S. O. ch. 50., would not prevent the examination of a party in a cause after verdict. The object of the section was to afford a party such legitimate information as he could obtain from his adversary before trial. Here the cause has not really been tried. The entry of a formal verdict was no bar to the examination of a party within either the spirit or the letter of the statute. *Manufacturers' Ins. Co. v. Atwood*, 7 Pr. R. 13, shews that the reference of the cause to arbitration would not affect the right to examine.

MR. DALTON held that the effect of the verdict upon the order to examine was to render the latter void, together with the appointment made in pursuance of it. The order to examine was granted for the purpose of assisting the plaintiff in proving his case at the trial, and when once the trial had taken place the order could no longer be acted on.

Summons discharged.

IN RE HENNEY ET AL. V. SCOTT.

Division Court—Prohibition—Substitution of defendant.

A witness in a Division Court suit having admitted that he was the real debtor, the plaintiff was allowed, under D. C. Rule 115, to substitute the witness as a defendant and obtain a judgment against him. ^{REPORT}
Held, on an application for a prohibition, that the Division Court Judge had power to do this.

[April 30, 1880.—*Galt, J.*]

A suit was brought in the First Division Court of the County of Lennox and Addington, against the wife of the defendant, for gas supplied to the *Express* newspaper office at Napanee. On the trial, the present defendant

appeared as a witness, and stated ; "I am publisher of the *Express*, and have been since about July last. My wife owns the plant. I owe the account." Upon this, the learned Judge, at the request of the plaintiff, substituted Scott as defendant, and gave judgment against him.

G. T. Blackstock, for the defendant, obtained a summons for a prohibition, on the ground that the Judge had no power to substitute the present defendant without the consent of the latter.

Meek, for the plaintiff, shewed cause.

GALT, J.—By the 115th rule of the Division Court Procedure, it is enacted, where a person other than the defendant appears at the hearing, and admits that he is the person whom the plaintiff intended to charge, his name may be substituted for that of the defendant, if the plaintiff consents, and thereupon the cause shall proceed as if such person had been originally named in the summons. Mr. Blackstock contended that, as there was no evidence the plaintiff intended to sue the defendant, but on the contrary the suit was brought, and was intended to be brought, against his wife, this rule does not apply. It appears to me, if I were to give effect to this argument, the result would be that the rule is wholly inoperative. The intention of the plaintiff was to proceed against the person who occupied the premises to which the gas had been supplied. I do not think there could be a stronger case than the present, in which the rule ought to prevail. It appears from the defendant's own evidence that his wife is the owner of the plant, and occupied the premises until the month of July last, when he became the publisher by some arrangement made with her. This summons is therefore discharged, and with costs.

YOUNG V. HOBSON.

Costs—Term motion—Interlocutory costs—Set off.

The costs of a motion in term are interlocutory costs, and the party to whom they are awarded is entitled to have them set off against the judgment of the opposite party obtained in the same cause.

Held, also, that the costs of a motion made after judgment might be treated as interlocutory, for the purposes of a set-off under Reg. 52.

[April 16, 1880.—*Osler, J.*)

A verdict having been rendered for the defendant at the trial, the plaintiff moved for, and obtained a rule *nisi* for a new trial. Upon the argument of the rule the defendant put in new documentary evidence, and upon this the rule was discharged, but the defendant was ordered to pay the costs of the term motion. The defendant then proceeded to tax his costs of the cause, and notified the plaintiff to bring in a bill of his costs in term. This the plaintiff failed to do. The defendant then taxed his own costs of the cause, and signed judgment for them, but failed to recover the amount from the plaintiff, who was a person of no means. Subsequently the plaintiff's costs of the motion were taxed, and the Master gave his *allocatur* for them to the plaintiff. The defendant then took out a summons to set aside the service of the plaintiff's bill of costs, the taxation and the *allocatur*, or to set off these costs against those taxed to the defendant in the cause.

Aylesworth, for the plaintiff, shewed cause, contending that the costs sought to be set off were not interlocutory costs, and consequently *Regula Generalis*, 52, did not apply.

Holman, for the defendant, supported the summons. He argued that the costs were plainly interlocutory, and that a set-off should be allowed. He cited *Howell v. Hardinge*, 8 East 362; *Holliday v. Lawes*, 3 Bing. N. S. 774; *Abbott's Law Lex.* 637; *Smith's Action at Law*, 8th Ed., p.

182; *Eyre v. Thorpe*, 6 Dowl. 768; *Melville v. Leesom*, E. B. & E. 324; *Lush's Pr.* 328; *Pulling on Attorneys*, 315; *Thompson v. Parish*, 5 C. B. N. S. 685.

OSLER, J.—The costs sought to be set off here are clearly interlocutory costs. They were incurred before the ultimate judgment of the Court upon the whole record: *Scott v. Richebourg*, 11 C. B. 451. But even if they had been costs of a motion made after judgment, they could be treated as interlocutory for the purpose of such an application as the present: *Thompson v. Parish*, 5 C. B. N. S. 685.

These being interlocutory costs, Rule of Court 52 applies, and they may be set-off. If the defendant had brought them, or the plaintiff had compelled him to bring them, in before final judgment had been signed, the Master might and ought to have set them off on the taxation. The defendant now appeals to the equitable jurisdiction of the Court to allow the set-off. Circumstances may exist in which it may not be proper to do so; e. g., the cases of *Scott v. The School Trustees of Burgess and Bathurst*, 6 U. C. L. J. N. S. 262; *Bennett v. Tregent*, 6 P. R. 171. But there is nothing in the present case which should take it out of the general rule, and it would be (as Cockburn, C.J., said, in *Thompson v. Parish*, *supra*) an abuse of the process of the Court, and injustice to the execution creditor to compel him to hand over to his debtor this money, which has accrued due in the same cause as interlocutory costs.

It was urged that the Court when discharging the rule did not intend the costs of the application to be set off. Possibly not. I say nothing as to that, but I can only deal with the order as I find it, and the payment of the costs is not made a condition precedent. The plaintiff is entitled to the costs of the application, the same together with the other costs to be set-off against the defendant's costs of suit.

Summons absolute.

CALVERT V. BLACK.

Dower—Mortgage—42 Vic. ch. 22, O.

The defendant, a judgment creditor, being the owner of lands subject to mortgages in which his wife had joined, sold the same, and allowed her to receive a part of the purchase money for her dower. On an application for a *ca. sa.*

Held, that she was not entitled to anything for dower, and that the 42 Vic. ch. 22, sec. 2, O., does not apply to a case of voluntary sale by a husband.

[May 7, 1880.—*Galt, J.*]

This was a summons calling on the defendant to shew cause why a writ of *capias ad satisfaciendum* should not issue against him on the ground that he had parted with his property, or made some secret or fraudulent conveyance thereof, in order to prevent its being taken in execution. The facts appear in the judgment.

Fullarton, shewed cause.

Tilt, supported the summons.

GALT, J.—From the examination of the defendant it appears he was the owner of land in the township of Markham to the value of about \$13,300, subject to several mortgages. The defendant stated: "I sold this land last fall to William Hood, of Markham, for \$13,300. I think this was the amount. Out of this amount he paid \$2,500 in cash, \$2,000 to my wife, and \$500 to myself. My wife said she would not sign the deed until she received the \$2,000. My wife had signed all the mortgages upon the farms." The \$2,000 was paid to the wife for her dower, and in discharge of a debt of some \$550 which she claimed as due to her from some dealings with her mother. There was also another sum of \$350 which defendant represented he owed to his wife, arising out of some transaction that took place upwards of twenty years ago, but this claim, such as it was, was not pressed on the argument before

me, as it was not sustainable. The case was reduced to this:—The defendant received a sum of \$2,500, out of which he allowed his wife to receive and retain a debt of \$550, and a further sum of \$1,450 for her dower. The case of *Fleury v. Pringle*, 26 Grant 67, is in its circumstances very similar to the present. Spragge, C., in giving judgment says: “In the late case on rehearing in *Re Robertson—Robertson v. Robertson*, 25 Gr. 276, it was the opinion of all the Judges of this Court that after mortgage given by a wife, it was in the power of the husband to sell his equity of redemption without his wife joining in the conveyance, she being only dowerable of that equity in the event of his dying seized. *Black v. Fountain*, 23 Gr. 174, had been already decided in affirmation of the same principle. It was therefore the right of the husband to receive the whole of the consideration payable on the sale to York, and she receiving a portion of it received it as in law his appointee.”

This decision is conclusive as to the present summons, unless the late statute 42 Vic. ch. 22, O., sec. 2, has made a change in the law. That section is: “In the event of a sale of the land comprised in any such mortgage or other instrument under any power of sale contained therein, or under any legal process, the wife of the mortgagor or grantor who shall have so barred her dower in such land, shall be entitled to dower in any surplus of the purchase money arising from such sale which may remain after satisfaction of the claim of the mortgagee or grantor, to the same extent as she would have been entitled to dower in the land from which such surplus purchase money shall be derived, had the same not been sold.” It was contended by Mr. Tilt, and I think correctly, that this enactment has no application to cases of a voluntary sale by the husband. The consequence is, the wife of the defendant was not entitled to any portion of the purchase money as compensation for her dower. It is impossible to read the examination of the defendant without arriving at the conclusion that this payment to the wife was made for the express

purpose of delaying and defrauding the creditors of the defendant, and this plaintiff in particular.

It was urged by Mr. Fullarton that a similar application had been made to Cameron, J., and discharged; but, in reply, it was stated by Mr. Tilt that that summons was not the same as the present, and had been made under R. S. O. ch. 50, sec. 305, whereas the present is under ch. 67, sec. 7, and that the learned Judge had discharged the former summons on the ground that as it was in some of its provisions of a penal character, and as he was not satisfied there was any actual positive fraud, he would not make it absolute, leaving the plaintiff to apply under the other Act.

As I am of opinion that the effect of the transaction between the defendant and his wife was to place her in possession of a large sum of money, to which she was not entitled, although they may have both erroneously imagined she had some claim, this summons will be absolute, but I think the plaintiff should afford the wife an opportunity of preventing the imprisonment of her husband, by withholding the issuing of the writ for a few days. This must, however, rest with himself, as I have no power to make it a condition.

CHANCERY CHAMBERS.

STEPHENSON v. BAIN.

Contract of sale—Loss after execution of.

A purchaser at a sale under decree signed the usual contract to purchase, and paid the deposit. The next day the buildings on the property were burned down.

Held, on appeal, reversing the decision of the Referee, *ante* p. 166, that the loss would not fall on the purchaser, as the interest contracted for did not vest in him till the report on sale was confirmed.

[February 12, 1880.—*Proudfoot, V.C.*]

THIS case is reported at page 166.

Fleming, for purchaser (appellant).

Hoyles, for plaintiff (respondent).

Plumb, for infants (respondents).

The following is the judgment on appeal.

PROUDFOOT, V. C.—On the 25th of April, 1879, a hotel, and the lot on which it stood, were sold under the decree in this suit, when * * became the purchaser, at the price of \$1,500. The conditions were the usual conditions prescribed by the Orders of Court. The purchaser paid a deposit of ten per cent. On the following day the hotel was destroyed by fire. The lot, without the building, is said not to be worth more than the deposit. The building was insured, but the insurers decline to pay; and the policy, it seems, is not available to the purchaser. A report on sale was subsequently made, and confirmed in the usual manner, by the lapse of a month.

The Referee has made an order for payment into Court

of the remainder of the purchase money; and, in case of default, for a resale; and in case of a deficiency, for payment of it by the purchaser.

From this order the purchaser appeals, insisting that the sale was not complete till the report on sale was confirmed, and that a loss arising before that time falls on the vendor and not on him.

In the case of a sale not under a decree, the general rule, as now stated by the text writers, and supported by many decisions, is, that the loss after the contract falls upon the purchaser: *V. & P.*, 14th ed., 291; *Fry on Spec. Perf.*, secs. 598, 600. Mr. Fry cites a passage in the Institutes (Lib. 3, tit. 24, sec. 3,) in support of this rule, that the thing sold is at the risk of the purchaser from the time the contract has been completely made. And the language of that text apparently supports this statement. But other texts are to be found in the *corpus juris* that qualify the harshness of this rigid rule, and introduce a limitation, to render it more consistent with equity, that the rule only applies after the subject of sale has been delivered. Some eminent jurists (*e. g. Cujas*) have interpreted the passage in the Institutes to mean, that after the contract the property is at the risk of the purchaser in this sense, that he cannot have what he bargained for when it is destroyed, nor sue the vendor for not carrying out the sale; and he thus loses the advantages he might have had from the purchase. But that he was not to lose the property and the price also; and therefore if he has paid the price he may recover it.

But whatever may be the true rule to be found in the civil law, Lord St. Leonards, in the passage cited, says it was not always the rule in the English law; and, indeed, in 1801, it seems to have been considered an arguable point: *Paine v. Meller*, 6 Ves. 349. *Bracton* (Lib. 2 ch. 27) lays it down, that after the contract, and before delivery, the loss is generally ascribed to him who holds the property; because, until delivery, the vendor is truly the owner; and, therefore, that if a house is burned the loss falls upon the owner.

"Cum emptio et venditio contracta fuerit * * ante traditionem et post periculum rei venditae, illum generaliter respicit qui eam tenet, * * quia re vera qui rem emptori nondum tradidit, adhuc ipse dominus erit, * * secundum quod videri poterit, ut si * * aedes incendio consumptae * * videtur quod totum periculum pertineat ad venditorem."

In *White v. Nutts*, 1 P. W. 61, Lord Keeper Wright seems to have been of the same opinion. See also Sir Joseph Jekyll, in *Stent v. Baillies*, 2 P. W. 220: "If I should buy an house, and before such time as by the articles I am to pay for the same, the house be burnt down by casualty of fire, I shall not in equity be bound to pay for the house."

The rule seems too firmly established now in our jurisprudence to be influenced by any considerations as to its origin and history.

But the argument in this case turned chiefly upon the question, when a contract for sale under a decree is to be deemed so complete as to bring the rule into operation. It has been expressly held in *Ex parte Minor*, 11 Ves. 559, that upon a sale before the Master the property is not changed, so as to throw the loss upon the purchaser, until the report is confirmed. *Twigg v. Fifield*, 13 Ves. 518, is in conformity with the preceding. In *Anson v. Tougood*, 1 J. & W. 639, Lord Eldon seems to doubt whether anything could turn upon the report not being confirmed. In *Vesey v. Elwood*, 3 Dr. & W. 74, Lord St. Leonards examines the cases upon the subject, and seems to consider, that if the report be confirmed, the sale not disturbed, that there is no difference between sales out of Court and those under a decree: that the destruction of the property might be a reason for not confirming the report, or might induce the Court to modify the terms on which the sale would be enforced. The subject of sale in *Vesey v. Elwood* was an interest *pur autre vie*; the subject of sale was an uncertain interest, a chance, and the purchaser was held bound, he got what he purchased. In his work on Vendors and Purchasers, pp. 101, 292, Lord St. Leonards cites *Ex parte*

Minor, 11 Ves. 559, for the proposition that the bidder, not being considered as the purchaser until the certificate is confirmed, is not liable to any loss, by fire or otherwise, which may happen to the estate in the interim.

It is cited for the same purpose in *Dart* on Vendors and Purchasers, 4th ed., 1086, and in *Dan.* Chancery Practice, 1164, 5th ed., and in *Seton* on Decrees, 4th ed., 1398.

And in all these authorities, *Anson v. Towgood*, and *Vesey v. Elwood*, are distinguished as applying to cases where the subject of sale is itself liable to contingencies—such as a mere life estate. Lord St. Leonards himself quotes them in Vendors and Purchasers, p. 101, for that purpose.

I do not think anything turns upon the difference in the mode of conducting sales here and in England. The bidding paper is as effectually a contract as the agreement usually attached here to the conditions of sale.

I consider that *Ex parte Minor* has not been overruled, that it still remains good law, and that the order in this case must be discharged.

WESTERN CANADA, &C., v. INCE.

Receiver—Appointment of.

On the 29th January, 1878, an order was made directing that D. be Receiver in the suit, he first giving security to the satisfaction of the Registrar. At the date of the order and previously thereto, D. was the agent of the mortgagor, and as such collected the rents of the property in question. D. received verbal notice of the order and executed his own bond as security, which the Registrar declined to accept, and D. continued to receive the rents and pay them to the mortgagor. On the 20th May, D. executed a second bond, reciting order of the 29th January, and conditioned that he "do and shall account for every sum of money which he shall receive on account of the rent," which was filed on the 22nd of May, and on the 3rd of June, a copy of the order of the 29th January was served on him, and he was notified that his security had been accepted.

Held, by the Master in Ordinary, and affirmed on appeal by SPRAGGE, C., that D. was accountable for the rents received since the 29th January, but was entitled to be allowed for any disbursements properly made by him.

[October 22, 1879.—*The Master-in-Ordinary.*]
[December 4, 1879.—*Spragge, C.*]

J. C. Daniels had for some years acted as agent of the mortgagor in collecting the rent of the property in question.

On the 29th of January, 1878, the following order was made: "That J. C. Daniels be appointed to receive the rents and profits of the lands and premises mentioned in the first paragraph of the plaintiffs' bill, *he first giving security to the satisfaction of the Registrar of this Court.*"

A few days afterwards, the plaintiffs' solicitor verbally notified J. C. Daniels that he had been appointed Receiver, and that it would be necessary for him to procure sureties to join with him in a bond as security.

J. C. Daniels refused to give any security other than his own personal bond, which he then executed at the request of the plaintiffs' solicitor.

Upon this bond being submitted to the Registrar he refused to accept it as sufficient security, and of this the plaintiffs' solicitor informed J. C. Daniels within a day or two thereafter.

The plaintiff's solicitor then notified J. C. Daniels not to pay over to the mortgagor any rents collected, to which

J. C. Daniels replied that he still considered himself the agent of the mortgagor, and accountable to him only.

J. C. Daniels continued to collect rent, and pay the same over to the mortgagor, and no further step was taken to complete his appointment as Receiver till the 20th of May following, when the Registrar, being again applied to, decided to accept J. C. Daniels's bond without sureties.

A second bond was then executed by J. C. Daniels, dated 20th of May, reciting the order of 29th January, and conditioned that the Receiver (J. C. D.) do and *shall* account for every sum of money which he *shall* receive on account of the rent, &c.

This bond was filed on the 22nd of May, and approved of, and the appointment of Receiver was perfected on the 29th of May.

On the 3rd of June the order of the 29th of January was for the first time served on J. C. Daniels, and he was notified that his personal security had been accepted by the Master.

THE MASTER IN ORDINARY.—After consideration of this matter, I have come to the conclusion that the Receiver is liable to account for the rents received since the 29th of January, 1878, the date of the order appointing him Receiver. Had he not collected the rent I do not think he could, under the circumstances, have been made liable for them as having been guilty of any default. But that is not the case here.

The Receiver had for some years been acting as the agent of the mortgagor in collecting the rents of the property in question. Then the defendants, other than the mortgagor, finding that an arrangement previously made for paying over these rents to the plaintiffs was not being carried out, applied to this Court for a Receiver, and this agent was appointed to that office. He was notified of this, and that he should pay over the same rent to the mortgagor. This was a few days after the order was received. He must have known then that he had actually

been appointed Receiver, for the question came up as to his giving the security required by the order. He declined asking any person to become a security for him, and would give his own personal security only. A bond from him alone was prepared, but the Registrar declined to accept this, I presume because the parties would not consent to his appointment giving his own bond only. Nothing further seems to have been done then until the end of May, when his own bond was after all accepted as security.

In a suit the Receiver is, as between the parties, to be considered as appointed from the date of the order directing a reference to the Master to appoint one : *Fairfield v. Weston*, 2 S. & S. 96. After the date of the order the mortgagor had no right to collect the rents, and if he had no right to do so his agent had none either. The agent knew then of the order appointing a Receiver, and knew therefore that, as agent, he had no right to collect these rents. As Receiver he had strictly no right to collect them, for he had not given the security required by the order. He did, however, as a fact collect them, and when he did so, acting as agent of the mortgagor, or professing to be Receiver, it was an improper thing for him to do.

Such being the case, I think the matter should be looked at in the light most favourable for the mortgagees, and the defendants who procured the appointment of the Receiver, and that these rents should be charged against him as if collected in his character of Receiver, and as security for the due application of which the bond he afterwards gave stands as a security.

Any disbursements properly made, and which would be allowed to a Receiver, he is entitled to have allowed to him.

This judgment was appealed from by the Receiver, and the appeal came on before The Chancellor on the 4th of December, 1879.

J. H. Ferguson, for the Receiver. The Receiver can only be charged in this suit with rents collected by him after his appointment, and under the order of the 29th of January he did not become Receiver till the security to the satisfaction of the Master had been given, and under General Orders 283 his appointment had no effect till after the perfecting of the security required. The case of *Fairfield v. Weston*, 2 S. & S. 96, referred to by the Master, is an authority only for the proposition that where a party to a suit is appointed Receiver the appointment shall date from the date of the order. It has no application where a stranger is appointed. The condition of the Receiver's bond given on the 20th of May, only referred to rents to be received after that date, and this should limit the extent of his liability : *Smith's Chancery Practice*, 7th ed., 1028-1030—General Order 279 ; *Kerr on Receivers*, 112.

H. J. Scott, for plaintiffs.

George Morphy, for defendants.

SPRAGGE, C., dismissed the appeal.

BLOOMFIELD v. BROOKE.

Executor—Chargeable with default of co-executor—Domicile.

J. B., Sr., and S. D., of Montreal, had been executors of C. B., who died in Montreal about 1844. S. D. proved the will in Ontario. The plaintiffs (two infants) were solely entitled under this will. J. B., Sr., died in Montreal, in 1869. T. B. and J. B., Jr., were his executors, and both proved the will in Ontario, but T. B. alone acted as executor, J. B., Jr., having given him a power of attorney to act for him in all matters relating to the estate. The plaintiffs and T. B. and J. B., Jr., were each entitled to a one-third share under the will of J. B., Sr. A suit was brought for the administration of both estates, and a Receiver appointed. In taking the accounts before the Master S. D.'s attendance was dispensed with, as it appeared that none of the assets of C. B.'s estate in Ontario had come to his hands. The Master found T. B. and J. B., Jr., who did not appear or file any accounts, indebted to the estates in about \$51,000. In default of evidence to shew that any of the assets came to their hands formed part of C. B.'s estate, the Master further found that the whole formed part of J. B., Sr.'s, estate. The decree ordered the executors to distinguish the assets of each estate, and notified them that in default the whole would be taken to belong to the estate of J. B., Sr. T. B. having died, the suit was revived.

J. B., Jr., applied to the Court for leave to open and retake the accounts, on the ground that he had been kept in ignorance of the proceedings by his co-executors. Leave was given him to surcharge and falsify. J. B., Jr., now distinguished the assets of the two estates, and sought to be relieved from liability as to the estate of C. B., on the ground that he was not executor of that estate: as to the J. B., Sr., estate, he also sought to be relieved in several respects. The Master's judgment is upon these points. *Held*, that T. B., and J. B., Jr., did not by proving the will of J. B., Sr., become executors of C. B., as J. B., Sr., was not the sole or surviving executor of C. B.

Held, that J. B. Jr., is liable for the moneys of J. B., Sr.'s, estate, come to the hands of Thomas, whether before or after the proving of the will, or before or after the power of attorney.

Held, that the writ of attachment or registration issued in Quebec did not affect the assets in Ontario.

Held, that as the Ontario Bank shares, though subscribed for at Montreal, and at one time registered there, were transferred to Bowmanville during the testator's life, and appeared in the stock register there only, they are Ontario assets.

[*The Master in Ordinary.*]

John Brooke, Sr., a resident of Montreal, died there in November, 1869. His executors were Thomas Brooke and J. Brooke, Jr., both of whom proved the will in Ontario, but Thomas Brooke, a barrister, residing in London, England, alone acted as executor. John Brooke, Jr., lived in the Isle of Man, and had given his co-executor a power of attorney to act for him in all matters relating to the estate.

John Brooke, Sr., and one S. Dallimore, of Montreal, had been executors of Charles Brooke, a brother of J. Brooke, Sr., who died in Montreal about 1844. The plaintiffs, two infants, were solely entitled under the will of Charles, and the plaintiffs and Thomas and John were each entitled to one-third share under the will of John Brooke, Sr.

This suit was brought for the administration of the estates of both Charles Brooke and John Brooke, Sr., in Ontario. Thomas and John Brooke, Jr., were charged with misconduct as executors, and a Receiver of both estates, in Ontario, had been appointed. In the taking of the accounts the attendance of Dallimore before the Master had been dispensed with, as it appeared that none of the assets of Charles's estate in Ontario had come to his hands. Thomas and John failed to file any accounts, or to appear before the Master, and were placed in contempt of Court, and the Master proceeding in their absence upon a surcharge filed by the plaintiffs, found them indebted to the estates in about \$51,000. In default of evidence that any of the assets came to their hands formed part of Charles's estate, the Master further found that the whole of the assets formed part of the estate of John Brooke, Sr. The Court, on further directions, ordered the executors to be personally served with a warrant directing them to distinguish the assets of each estate, and notifying them that in default the whole of the assets would be taken to belong to John Brooke, Sr.'s, estate. Thomas Brooke having died, the suit was revived, and warrant as above served.

John Brooke, Jr., when served with this warrant, applied, on petition, to the Court, for leave to open and retake the accounts, on the ground that he had been kept in ignorance of the proceedings by his co-executor, who had become partially insane, and on such petition leave was granted him to surcharge and falsify the accounts. The assets belonging to the two estates were now distinguished by John, and he sought to discharge himself entirely from liability in connection with Charles's estate, on the ground that he was not executor of that estate. As to the John

Brooke estate, he also sought to be relieved in the following respects :

1. As to \$7,313.33, portion of the estate which had been sent by Thomas to Montreal, the testator's domicile, and there accounted for.
2. As to several dividends on Ontario Bank stock, on the ground that they were payable at Montreal, and therefore only to be accounted for in the Province of Quebec.
3. As to interest charged against the executors on account of two mortgages made by Soper and Souch to John Brooke, Sr. The mortgagors had paid the mortgage moneys, about \$14,000, into the Ontario Bank, Bowmanville, to the credit of the executors, as the bank account of the estate shewed, in May 1872 and 1873 respectively, but discharges had only been executed by Thomas Brooke, in 1876, and oral evidence was given to shew that the moneys had been paid into the bank to a special account to the credit of the mortgagors, and were not paid to Thomas Brooke until the releases were executed by him.
4. As to disbursements in connection with the estate in Ontario, for which credit had not been given in the former enquiry, no proof of them having been then offered.
5. As to \$4,598.10, shewn to have been properly expended in the Province of Quebec, in connection with the estate.
6. As to interest charged against the executors on the balances from time to time in their hands, evidence was given that an attachment of the estate had issued in Quebec in 1871, which prevented the executors from dealing with the estate, and so from obtaining interest; and it was contended further that it was not for an auxiliary Court to charge executors with interest at all; that that was a question to be dealt with at the place of their domicile, where alone the disbursements and balances in respect to the whole estate from time to time were known; also, that in any case no interest should be charged, as there was no positive breach of trust shewn, and the executors were not by the will directed to invest.

7. As to all the moneys received by Thomas Brooke, prior to 4th November, 1870, when John Brooke, Sr.'s will was proved in Ontario. It was contended that up to that date all moneys received by Thomas were received by him as a Quebec executor.

The other facts shewn appear sufficiently in the judgment.

T. Langton for the plaintiffs.

W. A. Foster for John Brooke.

The following authorities were cited :

On the question of liability of John as executor of John Brooke, Sr., for estate of Charles, received by John Brooke, Sr.: *Williams on Executors*, 276, 255; *Brook v. Haymes*, L. R. 6 Eq. 25.

As to liability of John for receipt of Thomas: *Mucklow v. Fuller*, Jac. 201; *Trutch v. Lamprell*, 20 Beav. 118; *Styles v. Guy*, 1 M. & G. 422, 431-2; *Toplis v. Hurrell*, 19 Beav. 423; *Jenkins v. Plombe*, 6 Mod. 93.

On the question of interest on balances: *Franklin v. Frith*, 3 Bro. C. R. 433; *Ashburnham v. Thompson*, 13 Ves. 401; *Johnson v. Prendergast*, 28 Beav. 480; *Knott v. Cottee*, 16 Beav. 80; *Tebbs v. Carpenter*, 1 Madd. 307; *Wiard v. Gable*, 8 Gr. 458; *Smith v. Roe*, 11 Gr. 311; *Inglis v. Beatty*, 2 App. R. 453; *Davenport v. Stafford*, 14 Beav. 319; *Re Johnston*, 25 Gr. 261; *Clouyh v. Bond*, 3 M. & C. 490; *Vanston v. Thompson*, 10 Gr. 542.

THE MASTER IN ORDINARY.—Thomas Brooke and John Brooke, the younger, did not, by proving the will of John Brooke, become executors of Charles Brooke. Had John Brooke become the sole executor or the surviving executor of Charles Brooke, they would have been so. But Dallimore had proved the will in Ontario, and on John Brooke's death he remained the surviving executor.

John Brooke then is not liable for any moneys which came to the hands of Thomas Brooke belonging to the estate of Charles. They did not come to the hands of Thomas as

co-executor with John, nor under or by virtue of the power of attorney which John gave him. Thomas may have made himself liable as an executor *de son tort*, but I am not now dealing with his liabilities.

John seems liable for the moneys of John Brooke's estate which came to the hands of Thomas, whether before or after the proving of the will, or whether before or after the giving of the power of attorney. These moneys were either a debt due from Thomas Brooke to the estate, or moneys in his hands as executor. John Brooke ought to have seen that the debt due by his co-executor to the estate was paid, or that the assets in his hands were being properly applied. If he did not he became liable for the acts and defaults of his co-executor. From the evidence he appears to have heard, in 1871 or 1872, that there were difficulties as to Thomas Brooke's management of the estate.

I do not see how the writ of attachment or registration issued in Quebec affected the assets in Ontario. The parties do not, at the time, seem to have thought that it did. The copy of the Ontario Bank account produced, shews that after the issue of that writ three sums of money, amounting to \$1,400, were paid out to or for Thomas Brooke, and one sum, \$700, was applied as the deposit on a new issue of stock.

The Ontario Bank shares held by the testator were Ontario assets. It is true they were originally subscribed for in Montreal, and were at one time registered there, but afterwards, and during the testator's life, they were transferred to Bowmanville, and appeared only in the stock register there. The dividends on the stock were payable at Bowmanville, though, as a matter of convenience for the stockholders, the dividend cheques were sent to the agencies where they resided, and cashed there.

As to the moneys paid on the Soper and Souch mortgages, I must take the sworn copy of the bank account produced as shewing the dates at which these were placed to the credit of the estate.

Even if not placed to the credit of the estate until a

later period, an arrangement should have been made for the deposit of the moneys at interest pending the execution of the discharges. Loscombe's letter to Thomas Brooke, of 9th of May, 1872, informed him that the money for the Soper mortgage was in hand to pay it off.

In regard to interest I think interest should be charged on the yearly balances in Ontario. The executors seem to have known that it was their duty to get interest on sums lying to their credit. Thomas Brooke spoke to Mr. Simpson about it, and was told the bank would pay interest, but he never took any step to make a bargain with the bank to pay such interest.

I cannot see that it was the Receiver's duty to make the bank pay him interest when the money lying there was handed over to him, nor that he was guilty of any neglect in not doing so. His duty, as Receiver, was to take possession of the funds of the estate which he might find. The liability of the bank to pay interest would depend on any bargain Thomas Brooke had made respecting interest. He made none, did nothing about it, except having the conversation with Mr. Simpson, which ended in nothing, but which, as it informed him he could get interest, left him without excuse for not getting it.

I do not see how I can charge the executors with interest upon the moneys sent to Quebec. There was nothing improper in the money being sent there. That was the former domicile, and any question of interest upon these moneys must, it seems to me, be dealt with there.

Any difficulty that there might be in charging interest upon the balances in Ontario, on the ground that only part of the estate is here being dealt with, seems to me removed by the fact that an account is brought in shewing the expenditure in Quebec.

The objection to charging interest upon balances unless the whole estate is being dealt with, or the estate is being finally wound up, is, that until then it cannot be ascertained, whether the executors are in advance to the estate, or have balances in their hands. Here the account of

expenditure in Quebec shews that the amount sent from Ontario alone exceeded the amount paid into them. In Ontario there seem to have been no debts.

The amount expended in Quebec should be reported. Dealing with the Ontario assets, I cannot allow these sums, but the facts of the payments having been made should be stated. Especially I think it to be so in view of the other facts being reported, that so much of the Ontario assets were sent to Quebec.

GODFREY V. HARRISON.

Married woman—Next friend—Rev. Stat. c. 125, sec. 4—Practice.

Where a married woman, married before the passing of 35 Vic. c. 16 (2nd March, 1872), files a bill in respect of property, whether acquired before or after that date, she is required to sue by a next friend.
Shelley v. Goring, 8 Pr. Rep. 36, referred to.

[March 3, 1880—*The Referee.*]

T. Langton moved on notice, on behalf of two defendants, for an order requiring a sole plaintiff, a married woman, to appoint a next friend within a limited time, or, in default, that the bill be dismissed, and that all proceedings be stayed until a next friend should be appointed.

The bill shewed that the subject of the suit was real property, the plaintiff's claim to which was as an heiress-at-law of her father, who died intestate in July, 1872, after the passing of the Married Woman's Property Act. An affidavit was filed shewing that the plaintiff was married in 1850. He referred to the terms of Rev. Stat. c. 125, secs. 4 and 20, and contended that sec. 20 only enabled married women to sue alone in respect of their separate property, and that sec. 4 only made such an estate as the plaintiff claimed in this suit her separate property if she were married after 2nd March, 1872. He also cited *Redman v. Brownscombe*,

6 Pr. Rep. 84; *Pruyn v. Soby*, 7 Pr. Rep. 44; and *Dingman v. Austin*, 33 U. C. Q. B. 190.

N. W. Hoyles, contra, referred to *Shelley v. Goring*, 8 Pr. Rep. 36; and *Furness v. Mitchell*, 3 App. Rep. 510; and contended that, under those decisions, property acquired after 2nd March, 1872, was subject to the Married Woman's Property Act whether the marriage was before or after that date.

Langton, in reply. *Furness v. Mitchell* was decided upon the construction of the original Act, 35 Vic. c. 16, sec. 1, which reads as follows: "After the passing of this Act the real estate of any married woman * * shall * * be held and enjoyed by her for her separate use," &c. The wording of the present Act, deliberately adopted by the Legislature (see 40 Vic. c. 7, sched. A 156), leaves no room for doubt. It reads: "The real estate of any woman married after the 2nd March, 1872, * * shall * * be held and enjoyed by her for her separate use," &c. *Shelley v. Goring* is misleading. The point stated in the head-note was not decided. The bill there was filed before the passing of the Revised Statutes, and it was agreed by both sides that at the time of filing the bill no next friend was necessary, so that the Chancellor's decision upon the point now raised was not asked.

THE REFEREE, after taking time to consider the Acts and authorities, said that the difference in the language of the two Acts was remarkable, and could have but one signification, viz.: that the Legislature had deliberately adopted, in the Revised Statutes, the construction put upon 35 Vic. c. 16, in *Dingman v. Austin*. The Revised Statute, therefore, did not make the property here claimed the separate property of the plaintiff, and therefore she could not sue without a next friend.

Order made staying proceedings till the plaintiff should name a next friend. Costs to be costs in the cause to the defendants who move.

RICHARDSON V. RICHARDSON.

Writ of ne exeat—Power of the bail to surrender the principal—Rights of parties as to money deposited in lieu of bail.

1. The sureties on a statutory bail bond under a writ of *ne exeat Provinciā* have no power to surrender their principal as at common law. An application by sureties for discharge from a bond and for repayment of the money paid to the sheriff as collateral security, was refused.
2. Where a party is entitled to an assignment of a bond, and to realize it for his own benefit, his rights are the same in regard to money deposited; and where in an alimony suit the statutory bond under a writ of *ne exeat* has been given, the plaintiff is entitled to have the moneys deposited as collateral security therefor, paid into Court, and applied in discharging arrears of alimony.

[February 17, 1879.—*Proudfoot, V. C.*]
[March 10, 1880.—*Spragge, C.*]

A suit was brought for alimony by Mrs. Richardson against her husband Arthur M. Richardson, and a decree was obtained, allowing her \$150 a year, alimony.

Pending suit and before decree, defendant was arrested on a writ of *ne exeat Provinciā*, and held to bail in the sum of \$450, which sum was paid to the sheriff by one of the sureties in cash as collateral security for bond.

John Richardson and Thomas Bright were joined as sureties in the bond, the condition of which was as provided by statute.

The words of the [statute are: “The bail or security * * * shall merely be to the effect that the person arrested will perform and abide by the orders and decrees made or to be made in the suit, or will personally appear for the purposes of the suit at such times and places as the Court may from time to time order, and will in case he becomes liable by law to be committed to close custody render himself (if so ordered) into the custody of any sheriff the Court may from time to time direct.”]

The first application was by the sureties for discharge from the bond and repayment.

A. C. Galt, for plaintiff.

G. H. Watson, for surety J. Richardson.

W. Barwick, for sheriff and surety Bright.
Creelman, for defendant.

The cases are referred to in the judgments.

PROUDFOOT, V. C.—An alimony suit. The defendant was arrested and held to bail on a writ of *ne exeat Provinciā*. The usual bail bond was entered into, and one of the sureties paid \$450, the sum endorsed on the writ, into the hands of the sheriff. The defendant was surrendered to the sheriff, and then applied for his discharge, which was granted, but so as not to prejudice the liability of sureties, if any.

The sureties now apply for their discharge, and that the sum of \$450 be repaid.

The condition of the bail bond is, “that the person arrested will perform and abide by the orders and decrees made or to be made in the suit, or will personally appear for the purposes of the suit at such times and places as the Court may from time to time order, and will, in case he becomes liable by law to be committed to close custody, render himself (if so ordered), into the custody of any sheriff the Court may from time to time direct.”

An affidavit has been filed shewing that the defendant has not paid the alimony ordered, and that one of the sureties only joined in the bond on the other paying the \$450 into the sheriff's hands.

The condition of the bond has not been complied with nor its terms exhausted, and no order has been made for the committal to close custody of the defendant.

The only question is, whether the bail had power to surrender the principal as at Common Law. The R. S. O. ch. 67, sec. 25, is an authority for bail surrendering their principal, and that does not apply to a writ of *ne exeat*. In *Hovenden's notes to DeCarriere v. DeCalonne*, 4 Ves. 577 (note 8), it is said that when a defendant against whom a *ne exeat* has issued, and who has put in bail, is subsequently committed for a contempt of the Court from

which the first process emanated, the bail is not by such imprisonment discharged, and cannot even move, with success, may be charged in the custody of the Warden of the Fleet upon the writ. *Stapylton v. Peill*, 19 Ves. 615; *Le Clea v. Trott*, Prec. in Ch. 230, Colles P. C. 219. Lord Hardwicke, it is true, held a different doctrine in *Debazin v. Debazin*, 1 Dick. 95, but the earlier decision of Lord Keeper Wright, and the later judgment of Lord Eldon, as above cited, appear to establish a wide difference between the rules in Equity and those held at Common Law with regard to bail. And Mr. Hovenden advises prudent persons to be extremely cautious how they become bail for a party under a *ne exeat*, if, whatever reason they may have to alter their opinion of the individual's integrity or of his circumstances, they cannot, after having once become his securities, discharge themselves by surrendering his body.

In *McDonald v. McDonald*, 1 Chy. Ch. 22, an application of a similar nature was refused. The present Chancellor referred to Mr. Hovenden's note as shewing that it was at least doubtful if bail could render their principal on a *ne exeat*.

I do not think, under this state of the authorities, that an order should be made for the discharge of the sureties, and an order cannot be made for the repayment of the \$450 to the surety who paid it, as the other surety only signed the bond on the condition of that deposit.

The motion is refused, with costs.

The second application was by the plaintiff for the payment of the \$450 in the sheriff's hands, to be applied on account of arrears of alimony.

The same counsel appeared as in the foregoing application.

SPRAGGE, C.—The judgment of my brother Proudfoot, upon the application of the bail or security (as the Act styles it), in this cause for their discharge, goes far to dis-

pose of this application in the plaintiff's favour. It was held upon that application that the surrender of the principal under writ of arrest issued in this Court, does not entitle the bail to be discharged. I had expressed the same opinion in *McDonald v. McDonald*, 1 Chy. Ch. 22, referred to in the judgment of my learned brother. He refused the application to discharge the bail, or to authorize the bail to receive from the sheriff the sum of \$450, paid to him in lieu of bail for that amount. The present application is for payment into Court of that money; in order to its being applied in discharge of arrears of alimony and payment of costs.

Two cases are referred to in Mr. Beame's book on the writ of *ne exeat*: *Musgrave v. Medex*, p. 97, 1 Mer. 49, and *Utten v. Utten*, *Ib.* 51, in which the Court ordered parties who had given security on writs of *ne exeat* to pay into Court the amount for which the writ in each case was marked. In those cases the cause had not reached a decree; and therefore no disposition of the money was directed. In a case before me, I came to the conclusion that money deposited in lieu of bail stood in the same position as bail would have stood if given; and that where a party was entitled to an assignment of the bond, and to realize it for his own benefit, his rights would be the same in regard to money deposited.

If this money were in Court, the plaintiff would be entitled to have it applied in the way that is asked by this application; and there can be no objection to the order for payment, and to the application of the money when paid; being made in one order.

The order will be made accordingly, and with costs, against the defendant John Richardson, who is also to pay the costs of the sheriff upon this application.

FRASER v. GUNN.

Purchaser under a decree—Compensation to—Relief of from contract.

At a sale under a decree on the 25th March, 1879, A. purchased the land in question. On the 19th April, 1879, he transferred his interest to W., and on the 26th April, one H. purchased and took an assignment of the dower of one S. in the land.

On the 16th February, 1880, A. applied to be relieved from the contract to purchase on the ground of the outstanding dower.

The evidence shewed that S. had agreed with the heir-at-law to accept a gross sum in lieu of her dower, that W. really purchased the dower, but took the assignment in H.'s name, and that this application, though in A.'s name, was really made by W.

Held, that no relief could be granted, the applicant having himself created the obstacle by means of which he sought to prevent the sale being carried out.

[March 10, 1880.—*Spragge, C.*]

This was an application by a purchaser to be relieved from a contract of sale.

Abel, the purchaser, secretly conveyed to Wood all his interest in the purchase with the deposit of purchase money paid to the vendor's solicitors at the time of sale, and Wood covenanted with Abel to obtain his (Abel's) release from the purchase, or to indemnify him against the payment of the remainder of the purchase money and all costs. Wood then bought in an outstanding dower in the lands, the subject of the sale, and took a conveyance thereof in the name of Hunter. Wood and Hunter both swore that the purchase of the dower was made by Wood as agent for Hunter with Hunter's money, and for his sole benefit, and that Hunter was not a trustee of the dower for Wood or for Abel. This application was made in the name of Abel to have the sale rescinded and the deposit of purchase money repaid because the vendors were unable to make title by reason of the outstanding dower.

B. B. Osler, Q. C., for the purchaser:—

The dower is outstanding in Hunter, who is not before the Court, and in his absence he cannot be declared a trustee, nor can the dower be affected in his hands; the vendors are therefore unable to make title, and dower is

not a subject of compensation as against a purchaser who does not consent to take subject to it.

F. B. Robertson, for the vendors:—

Wood stands in the shoes of the purchaser, and this application is really made by him. He bought the dower, and took the conveyance thereof to Hunter for the purpose of preventing the vendors from making title, and he was at the time of his so doing in the purchaser's shoes. It is not necessary to have Hunter before the Court. He is really a trustee of the dower for Wood, but it is not necessary to affect the dower in his hands, for, even if he is not a trustee for Wood, the latter is still bound to take the title subject to the dower, being allowed what he paid for it on account of his purchase money. He might have bought it for that sum himself, and so made the title clear; and he having chosen for the purpose of escaping the performance of his contract to put it in the hands of a third person, he will not be allowed so to effect that purpose, but must take the consequences of his wrongful act, and fight his own battle with Hunter: *Murrell v. Goodyear*, 1 D. F. & J. 432. Further, this dower had been assigned contrary to common right before the conveyance to Hunter and exists only as a right to one-third of the rents during the life of the dowress. The right to an assignment by metes and bounds is gone: See *Fraser v. Gunn*, 27 Grant 63. This right to one-third of the rents is a proper subject of compensation, and the purchaser must take the title subject to it with compensation. He is not entitled to compensation for dilapidations: they are the consequence of his own wrongful delay in completing the purchase.

SPRAGGE, C.—The sale, which was under a decree of this Court, was on 25th March, 1879, Wesley Abel being the purchaser of the land in question. It was assumed by the solicitors in the cause that the dower of Barbara Stewart had been barred by the Statute of Limitations, and the advertisement, and particulars, and conditions were silent as to dower. Mrs. Stewart herself, however, per-

sistently claimed that she was entitled to dower; and it has been lately adjudged in this Court, by my brother Proudfoot, that she is so entitled: 27 Gr. 63.

On the 19th of April the purchaser transferred his interest in the purchase to Peter Wood; and on the 26th of the same month Peter Wood purchased from Mrs. Stewart her dower; and took an assignment thereof in the name of one Robert Hunter. It is made a question whether Hunter or Wood was the real purchaser. Both say that Hunter was so, and give evidence to that effect. There is a good deal of evidence the other way, and if it were necessary to deal with the dower itself, and for that purpose to make Hunter a party to this proceeding, I should be disposed to allow it, but in my view this is not necessary.

The application before me is in the name of Abel; but is in truth the application of Peter Wood, and is now avowedly so. The object of the application is, to be released from the purchase; and the ground of the application is, that the land purchased is subject to the dower of Barbara Stewart. If the dower were still in Barbara Stewart, and if she were entitled to have it set out by metes and bounds; and, refusing compensation, insisted upon its being so set out, there would be grave and perhaps insurmountable difficulties in compelling the purchaser to take the title; and if Hunter were the purchaser, not through the instrumentality of Wood, there would be the like difficulty. But these difficulties do not in fact exist. Barbara Stewart was not entitled to have her dower set out by metes and bounds; as she had, as appears by her evidence and that of Peter Fraser, agreed with the heir-at-law for a money compensation. This is explained in the judgment of my brother Proudfoot, to which I have already referred. Her assignee could have no better right, and I apprehend that at the worst, compensation, or rather indemnity, might be made to the purchaser, somewhat upon the principle upon which it was directed to be made in *Wilson v. Williams*, 3 Jurist N. S. 810 That, however, it is not necessary to determine.

Looking at all the circumstances attending the acquisition of the purchase from Abel, and the acquisition of the dower for Barbara Stewart, and the purposes for which both were made, as well as at the direct evidence, I can come to no other conclusion than that Wood, and not Hunter, was the real purchaser of the dower. Wood stood then the purchaser of the land. To suppose that he made himself the instrument of placing the rights of a dowress in the hands of a third person, would be to suppose him guilty of the suicidal folly of placing, with his own hands, the means of annoyance to himself in the hands of a third person. One cannot read the evidence without seeing that this is incredible. The key to his conduct is to be found in his desire from the first to create obstacles, so as, if possible, to get rid of the purchase of the land, and retain to himself the advantages that his bargain with Abel gave him. All this is evident when we look at the substance of the transaction; not merely at the shape in which Peter Wood, aided by Hunter and John F. Wood, chose to put it.

If I am right in my conclusion, the application before me is nakedly this: an application by a purchaser of land sold under a Decree of this Court to be released from his purchase by reason of an obstacle to its completion created by himself, and created for the very purpose of preventing the sale from being carried out. I am warranted in saying this, for the evidence shews that if the dower had remained in the widow she would have been a consenting party to a conveyance, upon receiving reasonable compensation. There is this further in the position of Peter Wood, that if the acquisition of dower made through, was in fact made for him, the dower is virtually "at home," and is no longer an incumbrance, and all that Wood can be entitled to, is the cost of getting in that incumbrance.

This is in principle very like the case of *Murrell v. Goodyear*, 1 D. F. & J. 432, which was cited by Mr. Robertson. In that case, a party who had entered into a contract of purchase got in an outstanding title, and L. J. Knight

Bruce, after stating this purchase of the outstanding title, proceeded thus: "It is the benefit of a bargain, thus effected for the purpose of destroying the original contract, or preventing the possibility of its fulfilment on the part of the original vendors, that the original purchaser insists on. My recollection does not furnish me with an instance similar to the present. Whether, if the original purchase shall ultimately go off for want of ability to make a title or procure a conveyance, Mr. Goodyear will be a trustee of this property for the assignees, they paying him what it has cost him, I will express no opinion, but that if the original contract shall go on he must be considered as having made this purchase for the purpose of relieving the title from the objection (as far as that objection goes), I have not the least doubt; the purchaser being entitled to have the money which he paid to Mr. Roper, the younger, allowed him, with interest and all the reasonable expenses incident to the purchase and conveyance from that gentleman."

There is also an earlier case, before Lord St. Leonards, when Lord Chancellor of Ireland : *Sheppard v. Doolan*, 3 D. & W. 1. There was a sale under a decree, and after the sale, and after objections to the title, the purchaser was said to have got in that which had been the ground of the objection. The Lord Chancellor referred to this as a circumstance which, if correct, might induce him to say that the purchaser has now no right to object to the title. "I may find myself," added the Chancellor, "at liberty to say to him, you have yourself removed all grounds of objection; you have yourself, behind the back of the Court, bought up the interest of the person who had the means of giving validity to the title; there was indeed a difficulty, but you have thought proper to purchase an interest which enables you to remove the impediments, and therefore you are bound to accept the title." Nothing could be more apposite than this language to the case before me.

In the case before me, the position of Wood is open also to this observation: that this being his application, he does not come into Court with clean hands. Whether he

acquired the dower for himself or for Hunter, his object in acquiring it was to create an obstacle in the way of the completion of the sale, and his doing so was reprehensible. I have taken it that he acquired it for himself; but, assuming for a moment that he did so incredibly foolish a thing as to make Hunter the real purchaser, I should not for that reason release him from his purchase. His object was a most improper one, and I should not allow him to attain it merely because some inconvenient consequences may possibly recoil upon himself.

His case of loss of the use of the land for one season, and of deterioration in value, must fail with the objection that I have dealt with. It is all traceable to his own schemes to some only of which I have thought it necessary to refer, to avoid the carrying out of the contract.

The application is refused, with costs.

RAMSAY v. McDONALD.

Sale under decree—Tender by plaintiff refused—Practice.

On the reference under the decree in a mortgage suit, the plaintiff put in several affidavits as to the value of the property, \$3,500 being the highest price named in them. The defendant did not file any affidavits in reply. The plaintiffs then tendered \$3,500 for the property, which the Master declined to accept without an order directing him to do so. The Referee on application refused such order, and on appeal, SPRAGGE, C., upheld his judgment.

[—*The Referee.*] [March 10, 1880.—*Spragge, C.*]

The bill in this case had been filed by the plaintiffs against the defendants to reform the mortgage security and sale thereof, and, on the hearing, a decree was made granting the relief prayed for. The plaintiffs' claim was proved at the sum of \$10,000.

The plaintiffs took the decree into the Master's office, for the purpose of having a sale. The Master issued a warrant to settle the advertisement, which was served upon the defendants, who appeared on the return of it.

The plaintiffs filed several affidavits as to the value of the property, and made a tender for the property at the highest valuation. The defendants asked, and obtained an enlargement to answer the affidavits filed: no affidavits were, however, filed by them. The sworn value was \$3,500. The Master declined to accept the plaintiffs' tender, unless an order was obtained by them for that purpose.

The plaintiffs thereupon gave notice of application before the Referee for such an order, and, on return thereof,

Mr. *Creelman*, for the defendants, opposed the application.
Mr. *McArthur*, for the plaintiffs.

THE REFEREE, after reserving judgment, refused the order.

The plaintiffs thereupon set the motion down by way of appeal from the order of the Referee.

Mr. *McArthur*, for the appeal, contended that the ordinary rule that a vendor could not purchase was inapplicable to this case, because the defendants had appeared in the Master's office, and had the fullest opportunity of investigating the valuation made by the plaintiffs. They, not having filed affidavits of value in reply, admitted that the valuation of the plaintiffs was a just and fair one, and that a larger sum could not be obtained at auction. It is impossible in a case like this for the vendor to commit any wrong, or to abuse his position, for everything is done under the eye of the Court and in the presence of the defendants. The value of the property is but about one-third of the plaintiffs' claim, and the defendants virtually admit that no more can be gotten for it at a public sale than the plaintiffs' tender; therefore a sale will be of no practical use to the defendants or the plaintiffs.

No one appeared for the defendants.

The Chancellor reserved judgment.

SPRAGGE, C.—It has always been the practice of the Court not to allow a party conducting a sale in the Court to bid at the sale. To allow it would be to permit him to occupy a position where his interest would be in conflict with his duty. This has been explained in several cases in this Court, and general order 381 expressly excepts, from parties who may be at liberty to bid, the party having the conduct of the sale.

What is asked upon this application, which is by the plaintiff having the conduct of the sale, is, that he may be at liberty to tender for the purchase of the mortgaged premises. His duty in the position which he holds as vendor is to get as high a price as he can for the premises. He is a trustee for sale, and that is plainly his duty. His interest, if allowed to occupy the position of purchaser, is to buy at as low a price as he can; to adopt that mode of sale which will best serve his own interest, and to prevent competition. His duty, as vendor, is the opposite of all this. To allow what is asked would be a negation of the principle upon which the Court has always acted in the matter of sales in the Court.

In England, the Master of the Rolls seems to have allowed all parties to bid, whether as a general practice or only under particular circumstances, does not appear; but he has preserved the principle to which I have referred as always prevailing in this Court, by directing the sale to be conducted by some solicitor not concerned for any of the parties: *Daniel*, 5th ed., p. 1153. In this way sufficient protection is afforded to the interests of all parties, and I do not see that the same practice may not with propriety be adopted here, though I desire not to commit myself to any decided opinion upon it, as it is not necessary to the disposition of the application before me. That, at any rate, must be refused.

STEVENSON V. SEXSMITH.

Costs—Proving in insolvency for—Estoppel.

The plaintiff filed his bill on the 14th March, 1874. On the 31st of the same month, an attachment in insolvency was issued by the defendant against the plaintiff.

The decree dismissed the plaintiff's bill, with costs, in October, 1874. Defendant proved against the estate for the costs of the Chancery suit, but did not take his dividend from the assignee in insolvency, and took no further steps for the recovery of his claim until after the order for discharge of the plaintiff (25th May, 1877,) when he issued execution. On the application of the plaintiff,

SPRAGGE, C., refused to set aside the execution, holding that defendants were entitled to issue it, and that the proving against the estate for the costs of suit when it was not legally provable, did not operate as an estoppel *in pais* between the plaintiff and defendant.

[March 12, 1880.—*Spragge, C.*]

This was an appeal from the Referee.

The facts appear in the judgment.

Macdonald, for plaintiff.

Maclennan, Q. C., for defendant Sexsmith.

SPRAGGE, C.—A decree dismissing the plaintiff's bill, with costs, was made on the 16th of October, 1874, the bill having been filed on 14th March, 1874. On 31st of the same month of March, an attachment in insolvency was issued against the plaintiff, at the suit of the defendant, Thomas Sexsmith. The defendants' costs of suit were taxed, and execution issued after a considerable interval, against the plaintiff's goods and lands. That execution the plaintiff now applies to set aside, on the ground that the defendants proved in insolvency for the same costs, as a debt due by the insolvent to them.

There was no such debt at the date of the issue of the attachment, and the debt was not therefore provable in insolvency. This Mr. Macdonald admits; but he contends that the defendants actually proved for this debt in Insolvency; and that they took no steps for its recovery by ordinary process until after the composition, which was approved by the County Court Judge. The Judge made his order, dated 25th May, 1877, for the discharge of the

plaintiff from all debts provable in insolvency against him. This debt, not being provable, was not thereby discharged.

Mr. Macdonald's contention is, that the defendants are estopped by conduct from setting up that the debt was not provable. Assuming that, as a fact, the solicitor of the defendants did make proof of this debt in insolvency, the question remains whether their doing so is an estoppel *en pais*, between the defendants and the plaintiff, which can be set up by the plaintiff. It would be different if the question were between the defendant and the assignee; but being as it is, between the plaintiff and the defendants, one essential quality of an estoppel is wanting—as put by Mr. Bigelow (p. 467), “The representation” (a term used for convenience, see p. 437), “must have been made with knowledge of the truth, to one ignorant of it.” The fact that this debt had no existence even before the issue of the attachment was as well known to the plaintiff as to the defendants. I think it clear that there can be no estoppel between these parties. The cases cited from the bankruptcy reports of parties having a provable debt and proving it, and having also a lien which they were not, under the circumstances, permitted to hold, are distinguishable: they were applications to the discretion of the Court, to which different principles are applicable. There is much force, certainly, in the observation of Chief Justice Wilson, in *Fowler v. Perrin*, 16 U.C.C.P. 262; but he puts a hypothetical case, and reprobates it. What he points at, however, would, as he puts it, be a fraud upon the other creditors, of which they would have a right to complain. The creditors here may have a right to complain, but it is not they, but the debtor, who is complaining.

The matter then stands thus: A debt that had not even its inception when the attachment issued had its place as a debt proved in insolvency. This was irregular and improper. The insolvent himself was to blame for not pointing out that it was not provable. His interest was to allow it to be proved without objection so as to escape future liability in regard to it. Whether he did more than

abstain from objecting is not shewn, but if he did no more, he allowed the creditors really entitled, to be prejudiced, at least by silence where it was his duty to the creditors to have spoken.

These parties, defendants in this suit, were wrong in making this claim in insolvency, but it was a wrong of the same character as the wrong of the insolvent, and they have gone no further. They have not taken what was adjudged by the assignee as their share of the composition: that remains an asset properly divisible among the creditors; and what they have now done is, what they ought to have done before, procure payment, if they could, from the estate of their debtor apart from the assets divisible among the creditors.

I do not acquit them, or their solicitor, from blame, and I base my decision upon this: that there is no estoppel to prevent the defendants shewing the true facts of the case; and that if I grant this application it would be granting relief to a wrongdoer against other wrongdoers in the same transaction.

I therefore allow the appeal.

Upon this application I have not strictly anything to do with the assets which were appropriated in insolvency to these defendants. The assignee will probably understand that they belong to the creditors, but he should not distribute as yet, as the plaintiff may rehear or appeal.

I am confirmed in the propriety of my decision by the fact that its effect is to leave to the creditors that which is their right, instead of leaving it to be taken by those who have no right to share with them.

RE EATON, BYERS V. WOODBURN.

Confirmation of report—Construction of General Orders 252 and 642.

A report requiring confirmation does not become absolute until thirty days from the making, and fourteen days from the filing thereof have elapsed.

[March 15, 1880.—*Blake, V. C.*]

J. C. Hamilton asked for the ruling of the Court upon the construction of General Orders 252 and 642, and asked that Accountant's clerk might be directed to issue cheques to which parties were entitled under decree and Master's report, the report having been filed more than fourteen days, but thirty days not having elapsed since its date. The Referee had refused to issue cheques.

BLAKE, V. C.—A report must have been made thirty days and filed fourteen days before the same is confirmed. The Referee was right in his ruling.

CARMICHAEL V. FERRIS.

Land to be sold under decree—Tender for—Compensation.

Where land was advertised for sale under a decree, and the purchaser, the owner of the adjoining lot, who had also been in possession, by his son, of the advertised premises, tendered for them knowing that the lands comprised fewer acres than the advertisement stated, and intending to seek an abatement after the purchase was completed, and a subsequent incumbrancer offered to give the same price for them as the purchaser.

Held, by Mr. STEPHENS, Referee, that the petitioner should be put to his election either to take the land without abatement of the purchase money, or to let it go to the subsequent incumbrancer.

Affirmed on appeal.

[February 2, 1880.—*The Referee.*]
[March 18, 1880.—*Blake, V. C.*]

In a mortgage suit the mortgaged premises were sold under a decree to the purchaser for \$1,302. After payment into Court of the purchase money the purchaser applied to the Referee in Chambers upon notice for an order for payment out to him of \$175 for compensation on account

of the shortage of acreage in the property sold, it containing 13 acres less than represented.

Mr. *F. E. Hodgins*, for the purchaser, cited *King v. Wilson*, 6 Beav. 124; *Denny v. Hancock*, L. R. 6 Chy. Ap. 1; *Whittemore v. Whittemore*, L. R. 8 Eq. 603; *Hill v. Buckley*, 17 Vesey 394; *Dart* on Vendors and Purchasers, 8th ed. vol. ii., p. 650; *Earl of Durvaur v. Legard*, 11 Jur. N. S. 706; *Cordingley v. Chersbrough*, 31 L. J. N. S. pt. 1, Eq. 617; *Barker v. Cox*, L. R. Chy. D. 464.

Mr. *Armour*, for subsequent incumbrancer, cited *Canada Permanent Loan and Savings Co. v. Young*, 18 Grant 566.

Mr. *Plumb*, for infants.

Mr. *Hoyle*, for plaintiffs, referred to *Re Turner and Skelton*, 13 L. R. Chy. D. 132.

The facts appear in the judgment.

THE REFEREE.—The purchaser was let into possession of the land in question about two years ago, under an agreement made with the plaintiff's solicitor, but which was not sanctioned by the Court, because the price offered by him was considered too low. He has been in possession ever since, either personally or through those representing him. The evidence and his own admissions shew that at the time he tendered he knew, or had reason to believe, there was not the number of acres mentioned in the advertisement for sale. Indeed, without his admission, it is hardly possible that he could have been deceived to any important extent as to the number of acres in a piece of land lying alongside a farm of his own and another formerly belonging to his wife, when it is borne in mind how farm lots are laid out in this country in parallelograms of equal size and between the same concession lines. And yet having previously offered a sum which had been refused, without protecting himself by making his second offer conditional upon the quantity being as stated or by reserving the right to demand an abatement if short, he makes his second offer

(with the secret intention of demanding an abatement), at a sum which, after deducting the abatement, would bring the price down to about that which had formerly been refused. The subsequent incumbrancer, in order to protect himself, had tendered within \$2 of the purchaser, and now offers to take the land at that sum or at an advance of \$2.

I think it would be most unjust to the subsequent incumbrancer to permit the purchaser, by what looks very much like a trick, to obtain the advantage which he seeks. He knew, or had good reason for believing, that if he had disclosed the real meaning of his tender, he would not have been declared the purchaser. I think the purchaser should be put to his election, either to take the land without abatement of the purchase money, or let it go to the subsequent incumbrancer, who offers to take it at the same price, which is sufficient to pay off his mortgage.

It appears to me that the principles laid down in *Cordingley v. Chersbrough*, 31 L. J. N. S. 617, and *Re Turner and Skelton*, 13 L. R. Chy. Div. 132, warrant this conclusion.

On appeal,

BLAKE, V. C., upheld the Referee's judgment.

RE HEYWOOD, INFANTS.

Appointment of guardian—Past maintenance.

It was provided in a will, (1.) That interest on investments should be paid by trustees for the benefit of certain infants to their guardian appointed by the will, or to such guardian, except the father of the infants, as the Court should appoint; and (2.) That if the father applied to the Court, the trustees were to allow the interest to accumulate and be invested till the infants became of age. The guardian named ceased to act, and after the lapse of two years (notice having been given to the father), it was ordered, (1.) That the petitioner, the aunt of the infants, with whom they had lived since the death of their mother, the testatrix, should be appointed guardian; (2.) That the petitioner should be paid for the past maintenance of the infants.

[May 3, 1880.—*Blake, V. C.*]

In 1875 Margaret Heywood, the mother of the infants, died. According to her will the estate vested in trustees, who were directed to have the same invested for the benefit of her infant children. The will also appointed a guardian, and provided that interest from investments should be paid to him, or such other guardian as the Court might appoint, except the infants' father. If the father applied to the Court the trustees were to allow the interest to accumulate and be invested until the infants became of age.

The guardian appointed by the will received the income of the estate for the first three years and applied it for the benefit of the infants, who had, from shortly before their mother's death, continued to reside with the petitioner, their aunt. The father is still alive, and has never interfered with the infants, who still reside with the petitioner. Two years ago the guardian appointed by the will refused to continue to act, and the trustees refused to pay for the maintenance of the infants until a new guardian was appointed. The petitioner applied, on notice to the father, to be declared entitled to be paid for the past maintenance of the infants, and be appointed guardian in spite of the father being alive. The father did not appear, and in his absence,

BLAKE, V. C., made the order as prayed in the petition.

H. Cassels, for the petitioner.

HARRISON V. JOSEPH.

Interest upon purchase money—Taxes—Certified copies of documents.

- (1) Where, in a sale under a decree, no undue delay in investigating the title is attributed to either party, interest upon purchase money is payable only from the date of the acceptance of the title, and not from the time named in the conditions of sale. (2) Where title was accepted, and possession given on the 6th March, 1880:

Held, that under sec. 347 of the R. S. O., ch. 174, and the terms of the city by-law, no taxes were due so as to form a charge on the land until 4th June, the date when the first instalment of taxes was due, and that the vendors therefore were not bound to pay any part of the taxes for that year.

Held, also, that the purchaser had no right to certified copies of registered and other documents procured at the expense of the vendors.

[April 12, 1880.—*The Referee.*]

At a sale in this cause, by tender, A. R. Boswell and D. McCarthy became purchasers at the price of \$24,200, payable as follows: "Ten per cent. upon notification of acceptance of tender; sufficient therewith within one month to make one quarter of the purchase money; the balance to be secured by mortgage over the premises, payable in three years, with interest at 8 per cent. per annum."

The report on sale was dated 3rd December, 1879, and confirmed on 3rd January, 1880. An abstract of title was delivered on 13th December, 1879, which, after setting out the paper title, stated that the vendors or those through whom they claimed had been continuously in possession of the land in question from 2nd June, 1864, to the present time. Objections to the abstract and to a supplemental abstract were served and answered, the abstract verified, and title accepted, conveyance executed, and possession given on 6th March, 1880. No undue delay was attributable to either party in the investigation of the title.

The fact that possession had gone with the paper title from at least 2nd June, 1864, was not the subject of any dispute between the vendors and purchasers in the course of the investigation of title.

The purchasers paid their deposit of ten per cent. on receiving notification of the acceptance of their tender, but did not pay the instalment of \$3,630, payable one month

from sale, viz., on 3rd January, 1880, until 6th March, 1880, and then without interest.

The vendors had not been receiving rents and profits, the property having been at the time of sale and having continued vacant.

Under these circumstances, the vendors contended that interest was payable from the 3rd January to 6th March, on \$3,630, at 6 per cent.

The purchasers claimed that the vendors should pay a proportion of the taxes for the year 1880, up to 6th March, when the title was accepted and possession given. The by-law for the collection of the taxes in Toronto for 1880 was passed on 2nd April, 1880, and provided that the taxes should be due and payable on 4th June, 1880, but that if an instalment was then paid, further payments by instalments might be made on 15th July, and 3rd September.

In the course of the investigation of title, the vendors procured, at some expense, for the purpose of verifying the abstract, certified copies of a number of old deeds, wills, and memorials. These the purchasers claimed to be entitled to with the other deeds and evidences of title. The vendors declined to hand them over, except upon payment of the expense of procuring them. The vendors also contended that the purchasers should bear the expense of registration of the mortgage given by them for the balance of purchase money: and these questions were by agreement submitted for the decision of the Referee.

The facts were brought before the Referee in a statement of admissions agreed upon by both parties.

T. Langton, for the vendors:—

1. The purchasers should pay interest. The contract was that \$3,630 was to be paid on a certain day, and the purchasers were bound on that day to pay it into Court, where it would bear interest, or else pay interest lost to the vendors by its not having been paid in. Independently of this view of the contract, where there is no special agreement as to interest, the rule is, that a pur-

chaser must pay interest from the time when a good title is shewn by the abstract, though the proof of the abstract may be given at a later period: see *Parr v. Lovegrove*, 4 Drew, 170; *Binks v. Lord Rokeby*, 2 Sw. 222, 226. Here it never was disputed that the vendors had a title by possession, and this was shewn by the abstract on 13th December, 1879. Under such circumstances a purchaser has been held bound to pay interest from the time fixed for completion: *Monro v. Taylor*, 3 Mac. and G. 713.

2. The purchasers must pay all the taxes of 1880. No taxes had accrued due on 6th March, when the conveyance was executed. The by-law was only passed and the rate struck on 2nd April, and by the terms of the by-law taxes were not to be due or payable till 4th June. Rev. Stat. c. 174, sec. 347, which enacts that in ordinary cases taxes shall be deemed to accrue due from 1st January, contains a proviso to the effect that this is not to be the case when it is otherwise provided by the by-law under which the same are directed to be levied: *Bank of Montreal v. Fox*, 6 Prac. R. 217.

3. The purchaser has no property in the certified copies procured and paid for by the vendors for a specific purpose. Though the vendor is bound to prove the abstract by sufficient evidence, and may not refer the purchaser to public offices where deeds are of record,—see *Sugden on Vendors*, 431,—yet the purchaser is not entitled to have certified copies given him of documents which are of record, unless the vendor retains the original. The purchaser is entitled to the originals with the estate, as being the evidences of the title: *Taylor on Titles*, 126, and *Coventry on Conveyancers' Evidence*, 116, 117.

4. *Sweetnam v. Sweetnam*, 6 Prac. R. 83, is an express authority that the purchaser must bear the expense of registering his mortgage.

A. R. Creelman, and *Eddis*, for the purchasers:—

1. The purchasers need not pay any of their purchase money, except the deposit, until possession is given them, or until they might safely take possession: that is, when a

good title is shewn and verified: *Dart* on Vendors and Purchasers, 282; *McDermid v. McDermid*, 8 Prac. R. 28. If the vendors wish to charge purchasers with interest from an earlier day they must shew that the purchasers have been guilty of delay in the investigation of the title. If the state of the title is such that a good title cannot be shewn until after the time fixed for completion, the purchasers should not suffer for it.

2. The taxes are, under Rev. Stat. ch. 174, sec. 347, a charge on the land from 1st January, and purchaser should only pay taxes from the date of conveyance.

3. The purchaser is entitled to the original deeds, and if the vendor is unable to furnish them, he must procure certified copies, unless he has protected himself by an express provision to the contrary in the conditions of sale.

4. The cases cited in *Sweetnam v. Sweetnam*, are not authorities for the decision, and it is contrary to the usual rule that the purchaser is to register the mortgage given by him. It is optional with the mortgagee to register the mortgage: whether he does so or not, is of no moment to the purchaser.

Langton, in reply. *McDermid v. McDermid* merely decides that until the title is accepted the vendor cannot move to compel payment of the purchase money into Court; because, until a good title does appear, it is uncertain whether the vendor can hold the purchaser to his bargain. When the vendor is in a position to move, however, that case does not decide from what period interest is payable.

THE REFEREE felt bound to hold, under *McDermid v. McDermid*, that, as payment of the purchase money could only be enforced when the title was accepted, or good title made, interest was only payable from that date. He held also that, under sec. 347 of Rev. Stat. c. 174 and the terms of the city by-law, no taxes were due, so as to form a charge on the land, until 4th June, and therefore the vendors were not liable to pay any of the taxes of 1880. He also held that the purchasers had no right to the certified copies of documents.

COMMON LAW CHAMBERS.

REGINA v. STEWART.

Absconding debtor—Order for writ—Debt due to the Crown—Affidavit of Debt—Waiver.

In an action at the suit of the Crown, an order was made for a writ of attachment against defendant as an absconding debtor. Service of the writ was accepted by his attorney, who entered an appearance to the writ: *Held*, that this was a useless proceeding, and that defendant should have put in special bail.

On an application to set aside the writ, *Held*, that any defect in the materials on which it was granted might be supplied by the affidavits used on such application.

Held, also, that the forfeiture of a recognizance to appear was a debt sufficient to support the application for an attachment under the Absconding Debtor's Act, and that such writ may be granted at the suit of the Crown, where the defendant absconds to avoid being arrested for a felony.

Held, also, that the amount for which special bail is to be put in need not be mentioned in the order for the writ.

Held, also, that the affidavit of debt, which in this case was made by the County Crown Attorney, was sufficient.

Held, also, that defendant was precluded by having accepted service of the writ, with knowledge of these alleged irregularities, and delayed moving until after the time for pleading had expired.

[April 6, 1880.—*Osler, J.*]

On the 13th of June, 1879, defendant was arrested in Hamilton on a charge laid before the police magistrate, that he had unlawfully and feloniously aided and assisted certain parties in abstracting a large quantity of spirits from a bonded warehouse in that city. On the same day he gave bail for his appearance, and the case was adjourned until the 17th of June. On the 17th of June defendant failed to appear, and the magistrate certified that he had forfeited his bail. An application was afterwards made for an order to estreat the recognizance, which order was

refused. On 9th January, 1880, an order was made by Osler, J., for a writ of attachment to issue against the defendant as an absconding debtor. The affidavits on which this order was obtained stated that defendant "had departed from Ontario, or was concealed therein, with intent to defraud the plaintiff." Defendant's attorneys accepted service of the writ, and entered an appearance.

On the 5th of March defendant obtained a summons calling upon the Crown to shew cause why the order made by Osler, J., dated 9th of January, 1880, directing a writ of attachment to issue against the defendant as an absconding debtor, and all proceedings had against him as an absconding debtor should not be set aside, on the following grounds:—

1. That the Act respecting debtors only applies to cases where debts are due from a person resident in Ontario to any other person, and not to the Sovereign, the proper remedy in that behalf being by writ of extent, or by writ of *scire facias*.
2. That the affidavits on which the said order was made do not show that the defendant was a resident in Ontario at the time of the alleged going to the United States, or the concealment in Ontario.
3. That no affidavit has been made by the plaintiff, her servant or agent, that the defendant is indebted to the plaintiff.
4. That from the said affidavits the defendant may as probably be concealed in Ontario, as absent from it.
5. That the said order does not state any amount, or for what amount the defendant may be at liberty to enter special bail.
6. That the defendant did not depart from Ontario with intent to defraud his creditors.

Aylesworth, shewed cause.

Ewart, supported the summons.

OSLER, J.—The order moved against was made on the 9th of January last.

The writ of attachment was issued thereon on the 10th of January.

On the 29th of January service of the writ of attachment was accepted on behalf of the defendant by the attorney who now takes the present proceedings. Such acceptance was given, it is to be presumed, in pursuance of the authority in writing given by the defendant to accept service of copy of the writ of attachment herein, and to defend him in this action, referred to in the 11th paragraph of the affidavit of the attorney filed herein.

On the 17th of February the defendant's attorney entered an appearance to the writ. This was an entirely useless and inappropriate proceeding, as the only way in which the defendant can entitle himself to defend the action is by putting in special bail as required by the writ: *Offay v. Offay*, 26 U. C. R. 363.

On the 19th of February, 1880, a declaration and notice "to plead in eight days, the defendant having first put in special bail, otherwise judgment," was served on the attorney.

On the 5th of March, some days after the time for pleading had expired, the present motion was made.

The first objection is disposed of by the Revised Statutes Ont., ch. 58, sec. 6: *Regina v. Guthrie*, 41 U. C. R. 148, 155; *Regina v. Williams*, 39 U. C. R. 397.

The fourth objection is met by the affidavits filed on behalf of the defendant, from which it appears that he did in fact abscond to the United States to avoid arrest on criminal process, and was not concealed in Ontario. I should hold, if necessary, that any defect in the materials on which the original order was granted might be supplied by the affidavits used by the defendant himself in moving against it, by analogy to the practice of the Court of Appeal on motions to set aside writs of attachment under the Insolvent Act.

The fifth objection is answered by the fact, that neither the statute nor the practice, as I understand them, require that the amount for which special bail is to be put in

shall be specified in the order for the writ, as is the case with an order for arrest under R. S. O., ch. 67, sec. 3. The 11th section of the Absconding Debtors' Act shews that it is the amount sworn to on obtaining the attachment for which special bail is to be put in, and that sum is mentioned in the writ.

It was objected on the argument, though not taken by the summons, that the affidavits do not shew the existence of a debt. I think that is sufficiently shewn : viz., a recognizance for \$3,000, which has been forfeited by default of appearance.

The 6th objection, is that the defendant did not depart from Ontario with intent to defraud his creditors, and this objection is supported by a number of affidavits stating that the defendant absconded to avoid arrest on a charge of felony, which in the opinion of the deponents is not departing from Ontario in the sense required by the Act respecting absconding debtors. No case was cited to shew me that this was the proper construction to be placed upon the Act, and I am clearly of opinion that it is not.

A debtor who departs from Canada to avoid arrest on criminal process thereby voluntarily withdraws his person from the reach of civil process also, and may well be said to depart with intent to defraud his creditors, though that be not his primary or even conscious intention. He comes also within the words of the statute, as having departed with intent to avoid *being arrested*.

As to the second objection, viz., that the defendant is not shewn to have been a resident of Ontario, I do not know that it would be assuming too much to hold that it sufficiently appears upon the whole from the affidavits now filed by the defendant, that he was in fact a resident, as his attorney swears that he has acted as his attorney for several years ; that he has considerable sums of money invested in mortgage security on real estate in the counties of Wentworth and Halton ; that he did not intend to "depart from Ontario to defraud the plaintiff, but went to the United States wholly because of the charge of felony s,"

preferred against him ; and his son swears that his father was not indebted (except as to the claim in this cause) to any person in any sum whatsoever, unless for mere small current household expenses ; but, on the contrary, was possessed of considerable means, chiefly investments of money on mortgage on real estate."

The affidavit of debt which was made by the county crown attorney I hold to be sufficient as against the third objection taken. It could not be inferred that it should be made by the Attorney-General himself.

But I think that the defendant is precluded both by the delay and the acceptance of service of the writ, from now moving to set aside the proceedings on any of the objections taken. His attorney received written instructions to defend before the 29th of January, and on that day accepted service of the writ. He knew then of the existence of all irregularities or defects of which he now complains, and not only took no steps to attack them, but entered a useless appearance, received a declaration, and did not move until after the time for pleading had expired : *Kidd v. O'Connor*, 43 U. C. R. 193. A whole term elapsed after the order was made, during which the defendant had notice of the irregularities, but no motion was made. I am of opinion that he now comes too late, and that the summons should be discharged, with costs.

Summons discharged, with costs.

NOTE.—A rule *nisi* was moved for in the following Term to rescind the order, and was refused.—REP.

BRYAN V. MITCHELL.

Ejectment—Equitable issue—Jury notice—R. S. O. ch. 50 sec. 257.

In ejectment where equitable issues are raised under R. S. O. ch. 50 sec. 257, the issues must be tried without a jury.

[June 4, 1880.—Mr. Dalton, Q.C.]
[June 8, 1880.—Armour, J.]

Holman, for the plaintiff, obtained a summons to strike out a jury notice filed by the defendant in an action of ejectment, for the reason that a defence upon equitable grounds had been set up, and that an equitable issue having been raised, the jury notice should be struck out under R. S. O. ch. 50 sec. 257.

J. Roaf, shewed cause and contended that this section not being in the Ejectment Act, it did not apply to actions of ejectment.

MR. DALTON held that the section mentioned applied to actions of ejectment, and made the summons absolute.

On appeal from the order,

ARMOUR, J., confirmed the decision.



IN RE DEAN V. CHAMBERLIN.

Rule Nisi—Enlargement—Lapse—Mandamus.

Where a rule *nisi* in a County Court was ordered by the Judge to stand over until the next term,

Held, that it was not necessary to take out a rule to enlarge the rule *nisi*, to prevent it from lapsing.

Where a County Court Judge improperly refuses to hear the argument of a rule *nisi*, *mandamus* is the proper remedy; and where the refusal to hear had been caused by an unmeritorious objection deliberately taken and insisted on by defendant, he was ordered to pay the costs of the application for *mandamus*.

[June 15, 1880.—*Osler, J.*]

On the 28th of May, 1880, *G. H. Watson* obtained from *Armour, J.*, a rule *nisi*, calling upon the defendant, and *Robert Denistoun, Esquire*, Judge of the County Court of the County of Peterborough, to shew cause why a writ of *mandamus* should not issue out of this Court, directed to the said Judge, commanding him to hear and determine upon the merits a certain rule *nisi* issued out of the said County Court, dated the 6th of January, 1880, and to hear and dispose of, upon the merits, the application of the plaintiff under the said rule; and to do such other things as might be necessary upon, and in respect to, the said rule *nisi*, for the determination thereof; and why the plaintiff should not be paid the costs of the application.

The facts appeared to be, that on Tuesday, the 6th of January, the second day of the County Court term, the plaintiff obtained a rule *nisi*, returnable on the following Friday, to set aside a nonsuit and enter a verdict in his favour on several grounds. On the Friday the parties appeared in Court to argue the rule, when, after waiting some little time, a letter was received by the Clerk from the Judge, stating that his son-in-law was dead at his house, and that the cases before the Court were to stand over until the first day of April term. The Clerk thereupon made the following entry in his term book: "Term adjourned. Cases to be taken first day of April term next."

An extract from the term book was produced, from which it appeared that this rule, and a similar rule in another case, the subject of another application similar to the present, was the only business before the Court during January term.

On the first day of the following term the rule came up for argument, when Mr. Denistoun, counsel for the defendant, objected that no rule to enlarge the rule *nisi* had been taken out in the previous term, and that the rule had therefore lapsed, and there was nothing before the Court.

It was urged that the Judge's note and the Clerk's entry was sufficient to keep the rule alive, but the learned Judge, conceiving that he was bound by the authority of *Jordan v. Gildersleeve*, 26 U. C. R. 361, sustained the objection, and declined to consider the matter, or to hear argument, or to give judgment on the merits,

The rule *nisi* had not been filed or set down on a general list.

On the 15th of June, 1880, *J. K. Kerr*, Q.C., shewed cause, and *G. H. Watson* supported the rule.

OSLER, J.—It was urged on the argument that *mandamus* was not the proper remedy in this case, and that the plaintiff should have appealed to the Court of Appeal, the question being one that arose upon a question for a new trial.

The 35th section of the County Court Act, R. S. O., ch. 43, enacts that, "In case any party to a cause is dissatisfied with the decision of the Judge upon points reserved; or upon any points of law arising upon the pleadings, or respecting the rejection or reception of evidence, or with the Judge's charge to the jury, or with the decision upon any motion for a nonsuit, or for a new trial, or in arrest of judgment, or for judgment *non obstante verdicto*, he may appeal to the Court of Appeal."

It is evident that the present case does not come within the section at all. There is no decision of the Judge. He

has merely refused to hear the rule, on the ground that it is not before the Court.

Apart from this objection, it was not argued that *mandamus* would not lie, and it would indeed be much to be deplored if an effectual remedy could not be found to relieve a plaintiff from the consequences of so grave a miscarriage of justice as has, inadvertently I am sure, occurred in the present case.

The question was, whether the rule had lapsed because it had not been enlarged by rule from January to April term. The objection was, under the circumstances, a most ungracious one, in any view of the case; and I am glad to be able to arrive at a clear opinion that it was not well founded.

In *Tidd's Practice*, 9th ed., vol. i., p. 502, it is said: "When the counsel for the party obtaining the rule is *not ready to support it*, he may move to enlarge the rule to a further day, in the same or the next term, which is pretty much of course when it is his own delay, but otherwise the Courts will not enlarge the rule without consent or some evident necessity. * * In like manner when the counsel for the party called upon by the rule is *not prepared to shew cause* against it, he may apply to enlarge the rule to a future day."

So in *Archbold's Practice*, 12th ed., vol. ii., p. 1584: "Either party, if not prepared to support or shew cause against the rule, should, if the opposite party will not consent to an enlargement, move that it be enlarged to a future day."

Batty v. Marriott, 5 C. B. 420, shews that where a party who has to shew cause against a rule moves to enlarge it, it is *his* duty to draw up and serve the rule for that purpose. Where a rule is enlarged *by consent*, it is the duty of the party who originally moved the rule to keep it alive.

In the present case neither party desired to enlarge the rule, and it was not enlarged by consent. Both parties appeared and were ready to argue it. And why was it not argued? Merely for the convenience of the Court. It was

postponed from one term to the next, at the instance, by the express direction, and as the act of the Court; and an act of the Court shall prejudice no man.

The case of *Jordan v. Gildersleeve*, 26 U. C. R. 361, which the defendant relied upon, has no application. That was the simple case of a party intentionally abandoning his rule, (which had been obtained in ignorance of the real state of the facts,) and deliberately refraining from moving to enlarge it.

I am of opinion that the rule had not lapsed, and that it should have been heard and determined by the learned Judge of the County Court. I may add that I have discussed the matter with several of my learned brethren, who agree with me in this conclusion.

Even if the rule had lapsed, it might have been thought to be a proper case for relieving the plaintiff by reviving it. See *Rowbottom v. Ralphs*, 6 Dowl. 291; *Smith v. Collier*, 3 Dowl. 100; *Johnson v. Durand*, Dra. Rep. 63.

The rule, therefore, will be absolute for a *mandamus* to issue to the learned Judge of the County Court to hear and determine the rule *nisi* issued out of the said County Court on the 6th of January, 1880.

There is no sufficient reason why the defendant should not pay the plaintiff's costs of this application, as he deliberately took and insisted upon the learned Judge giving effect to an unmeritorious objection, which he has now failed to maintain.

Rule absolute for a *mandamus*, with costs to be paid by the defendant to the plaintiff.

WHEATLEY V. SHARPE.

Render—Relation—Supersedeas.

Judgment was signed against defendant in Michaelmas Term, and he was rendered in discharge of his bail in the vacation following;

Held, on an application for a *supersedeas*, that the render related back so as to include Michaelmas as one of the two terms within which the plaintiff must charge the defendant in execution; and that not having been charged in execution until Easter Term he was entitled to his discharge.

Where a person is once supersedeable for want of being charged in execution, he always continues so, even though he is afterwards charged in execution, before the application for a *supersedeas*.

An application for a *supersedeas* was entertained, although a similar application in the same case had already been dismissed.

[June 29, 1880.—*Osler, J.*]

Aylesworth obtained a rule *nisi* from *Osler, J.*, sitting for the full Court, calling upon the plaintiff to shew cause why the defendant should not be superseded as to this action, being a prisoner in close custody in the gaol of the County of Huron, and the plaintiff not having caused him to be charged in execution within two terms next after the render of the defendant and notice thereof according to the course and practice of the Court.

Richards, Q.C., shewed cause.

It appeared that judgment had been signed on the 27th November, 1879, during Michaelmas Term, which ended on the 6th December. The defendant was rendered in discharge of his bail on the 16th December following, and notice of the render was duly served on the same day. The plaintiff did not charge him in execution until the 5th June, 1880, the last day of Easter Term. The defendant had on the 27th day of February obtained a summons for a *supersedeas* on the same ground as that on which the present rule was granted. This summons was heard before *Armour, J.*, who refused to make any order, holding that the defendant had not been in custody for two terms within the meaning of the rule.

OSLER, J.—It was admitted that the only rule of Court applicable to the case was that of Hil. 26 Geo. III., as the

defendant was not a prisoner when judgment was signed : *Curry v. Turner*, 3 Pr. R. 144.

Several objections were taken to the application. First, it was said that Mr. Justice Armour having refused to interfere, the matter could not be moved in or opened again, and further that this application was an appeal, or in the nature of an appeal from his order, and should therefore have been heard before the full Court.

If there was to be a sitting of the full Court in Trinity Term, I would certainly in deference to Mr. Justice Armour's view have enlarged the rule for argument before the full Court, but being of opinion that this is an independent application and not an appeal, though no doubt involving the same point as the former one, I think the defendant has a right to have it disposed of now, as the result would be that if he is entitled to his discharge the rule could not be heard before Michaelmas Term.

The case of *Neill v. Lovelass*, 3 I. B. Moore 8, shews that the refusal of the former application does not stand in the defendant's way.

Next, it was objected that the defendant having now been actually charged in execution, the motion was too late, and that the rule that where a prisoner is once supersedeable he is always so, must be understood with this qualification, that he is only supersedeable so long as he remains in the same custody and under the same process. For this proposition *Rose v. Christfield*, 1 T. R. 591, was cited. What that case decides, however, is, that if a defendant is superseded or supersedeable for want of or irregularity in proceedings *before* judgment, the plaintiff may, *after* judgment, take him in execution or charge him in execution if he has not taken advantage of the previous irregularity, but that it is otherwise if he be superseded for want of charging in execution : *Line v. Lowe*, 7 East 330, is to the same effect, and the same distinction is taken in *Colbron v. Hall*, 5 Dowl., 534, Littledale, J., said : "It is a violation of a rule of Court not to charge a prisoner in execution in the prescribed time, and it is a well-known established rule

that a prisoner once supersedeable *for want of being charged in execution* always continues so." In *Baxter v. Bailey*, 3 M. & W. 415, the defendant had actually been charged in execution before the *supersedesas* was applied for, but it was not suggested that that was any answer to the motion.

I think these objections fail.

The question then is, whether the defendant is supersedeable because the plaintiff did not charge him in execution in Hilary Term, and that depends upon whether the render in vacation after Michaelmas Term, in which judgment was signed, has relation to that term so as to make it one of the two terms after the render, within which, according to the rule of Hil. 26 Geo. III, the plaintiff should have charged the defendant in execution. That rule provides that a prisoner shall be entitled to be discharged in case of a surrender in discharge of bail after trial had or final judgment obtained, unless the plaintiff shall cause him to be charged in execution *within two terms next after such surrender*, of which two terms *the term wherein such surrender shall be made shall be taken to be one*: *Peacock's Rules K. B.* (1811) p. 158.

If the defendant had been rendered at any time during Michaelmas Term after the entry of judgment he would have been within the very words of the rule of Court, and the plaintiff must have charged him in execution at the latest during Hilary Term, for the rule expressly declares that of the two terms which it gives the plaintiff for that purpose the term in which the surrender shall be made *shall be taken to be one*. The effect of this is, and has always been, that if the judgment did not happen to be signed on the first day of term the plaintiff would not have the whole of the first term, though by fiction of law he no doubt had it when judgment, whether signed in term or vacation, had relation to the first day of term.

The render here was in the vacation after Michaelmas Term.

In *Smith v. Jeffreys*, 6 T. R. 776, it was held that though

the words of the rule of Hil. 26 Geo. III. were general, applying as well to the case of a surrender after verdict as after judgment, a distinction had obtained in practice between the two cases, and that though when a defendant surrendered in vacation after final judgment, the term in which judgment is signed was reckoned as one of the terms in which the plaintiff must charge him in execution the case was different when the defendant surrendered in the vacation after verdict: there the preceding term was not reckoned as one of the two terms. And in *Neill v. Lovelass*, 3 I. B. Moore 8, this is expressly affirmed to be the practice. There the judgment was signed in Trinity Term, and the render was in the following vacation. The defendant, not having been charged in execution until after the succeeding Michaelmas Term, was entitled to be discharged. The head note of the case is as follows: "If a defendant surrender in discharge of his bail in the vacation after final judgment, the term in which such judgment is signed is one of the two terms in which the plaintiff must charge him in execution."

After the English rule Hil. 4 Wm. IV.(1834) was passed, establishing the relation of judgments to term, it was contended that the practice by which a render in vacation has relation to the previous term was by analogy also abrogated. This, however, was expressly denied to be the practice in *Thorn v. Leslie*, 8 Ad. & E. 195, 3 Nev. & Per. 305 (1838).

This case was decided under the rule of Hil. 2 Wm. IV. I., 85, which is as follows: "The plaintiff shall proceed to trial or final judgment against a prisoner within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment, of which the term in or after which the trial was had, shall be reckoned one."

The plaintiff had obtained a verdict against the defendant in Michaelmas Term, 1836, and had entered judgment in the same term. The defendant was not in custody, and did not render himself until the vacation after Michaelmas

WHEATLEY V. SHARPE.

Term, 1837, and in Easter Term, 1838, not having been charged in execution during Hilary Term, applied to be discharged. The question was, whether he had been in custody for two terms after the judgment, that is for Michaelmas, 1837, and Hilary, 1838; and it was held that he had, the judgment having preceded both those terms, and the render in vacation having relation back to the preceding Michaelmas Term, so as to make that term count as one.

The case before me was argued for the plaintiff as if the case of *Thorn v. Leslie* had decided that a render in vacation never had relation back to the preceding term unless the judgment had been signed earlier than that term. But as I read that case it decides nothing of the kind. On the contrary, it expressly holds that the new rules had made no alteration in the former practice as to the relation of the render. What the defendant there had to make out was, not that the plaintiff had not caused him to be charged in execution within two terms *after the render*, but that he had not done so within two terms *after the judgment*, and this he could not have done if the judgment had been in the same term as or in the term immediately preceding the render. To have held that the render in vacation had relation to the term immediately preceding it would have availed him nothing if the judgment had been signed in that term, for he would not then have brought himself within the rule of Court, only two terms at the utmost, counting that in the vacation after which the render was made as one, having elapsed, and the rule containing no provision that the term in which the judgment was signed be treated as one of the terms for the purpose of charging him in execution.

The point really decided was that the former practice as to the effect of a render in vacation still prevailed; that such a render had relation back to the term preceding the vacation in which it was made; and that the judgment having been of a still earlier term the defendant had been in custody for the two terms after the judgment in which,

according to the rule, the plaintiff was bound to charge him in execution.

The counsel who shewed cause to the rule in *Thorn v. Leslie* cited the case of *Smith v. Jeffreys*, 6 T R. 776, to shew that the surrender in vacation did not relate back, and Patterson, J., said : "That applied to the case where the trial was in the vacation in which the render took place. The render was not allowed to relate back to a term preceding the trial. Here the judgment is signed of a term earlier than that preceding the vacation in which the render is made. Must not the surrender be considered to be of Michaelmas Term, 1837 ?" And again : "The rule as to the relation of the render is decisive unless the new rules have made any alteration."

There is some obscurity in the report arising from an observation which occurs in the judgment of Littledale, J., but bearing in mind the terms of the rule under which the defendant was applying, and comparing the report in 8 Ad. & E. with the report of the same case in 3 Nev. & Per., it is clear that the Court recognizes the former practice as to the relation of the render to the previous term as still subsisting, and that the allusion to the judgment being of an earlier term than that preceding the render, refers to the requirement of the particular rule under which the defendant was seeking his discharge.

The authority of *Neill v. Lovelass*, which appears to be on all fours with the present case, was not disputed.

No doubt if the judgment is signed in vacation a render afterwards in the same vacation cannot now relate back, for if it did it would include a term in which, even by fiction of law, there was no judgment in existence upon which the defendant could have been charged in execution. But if it be admitted, as I think it must be, that if judgment be signed in term, no matter at what time, provided it be in term time, and the render is afterwards in the *same term* that term, will then count as one of the two terms next after the surrender by the very words of the rule of Hil. 26 Geo. III., it appears necessarily to follow

that a render in the vacation after such term must have relation to that term with the same result, since there is in fact a judgment in such term to which the render can have relation.

I think the authorities I have referred to clearly support this conclusion. See also *Torrance v. Halden*, 10 U. C. L. J. 332; *Tidd's Practice*, 9th ed., p. 360, 563; *Lush's Pr.* 657; *Brash v. Latta*, 5 U. C. L. J. 226; *Golding v. Mackie*, 8 P. R. 237.

And whenever the rule of the relation of the render can be applied without disturbing the relation of the judgment, that is to say, whenever the judgment is of a term which precedes the render, there is no reason to urge that such a construction bears hardly upon a plaintiff, for he still has just as much time in which to charge the defendant in execution as he has under our rule of Court 99, when the defendant is a prisoner at the time when judgment is obtained.

I think the defendant is entitled to his discharge.

IN RE TOWNSHIP OF YORK AND WILLSON.

Arbitration—Award—Submission—Appeal—R.S.O. ch. 50, sec. 191.

Where a voluntary submission to arbitration contained a provision that the agreement might be made a rule of Court, and that the Court might be moved to set aside or refer back the award :

Held, that this conferred no right of appeal under R. S. O. ch. 50, sec. 191, which, under sec. 205, could only be conferred by the terms of the submission.

[August 28, 1880.—*Osler, J.*]

May 28, 1880, *J. K. Kerr*, Q.C., obtained a rule *nisi* from Armour, J., sitting alone, calling upon the Corporation of the Township of York to shew cause why the award made herein should not be set aside, on the ground that the arbitrators had not awarded to Willson the sum of \$1,393.19, being the amount of the moneys charged by him in his

accounts for the year 1878, and which were specially mentioned in the special report to the township council of the auditors of the township, dated 18th May, 1879, and which were allowed to Willson by the township council on the 1st of March, 1880, on the final audit and allowance of his accounts—the arbitrators having allowed and awarded to him the sum of \$988.20 for and on account of said moneys; and on the ground that the arbitrators should have allowed and awarded to him the sum of \$604.99 on account of the said moneys, in addition to the sum of \$988.20, allowed and awarded by them to him; or why the award should not be referred back to the arbitrators for their reconsideration and amendment, with the direction to the arbitrators to allow and award to the said Willson the said \$604.99, in addition to the moneys already awarded, and the sum of \$115.18 for interest, in addition to the sum of \$215 already awarded by the said arbitrators to the said Willson, for interest upon moneys advanced by him for the corporation, or such other sum as it may seem to the Court that Willson is entitled to in addition to the moneys already awarded to him.

The submission to arbitration was a voluntary submission, dated 23rd December, 1879, and recited that disputes and differences had arisen between the council and Arthur L. Willson, their clerk and treasurer, and that it was desirable to refer the said matters in difference and all questions of account between the parties as to the amount payable by the corporation to Willson in respect of services rendered by him as clerk and treasurer, and for expenses incurred by him in respect of his duties, and in the performance of the services aforesaid, and as to the accounts between the municipality and Willson, and as to the salary due and payable to him as such clerk and treasurer, and as to the alleged agreement between them respecting the same, and as to what moneys, if any, Willson was entitled to receive over and above his said salary from the municipality, and as to whether Willson as such treasurer had properly accounted for moneys received by him

as such ; and whether any money was due from the municipality to Willson, or from Willson to the municipality, and if any was due either way, then what amount. The submission then expressed that the parties thereby referred "all matters in difference between them to the award, &c., of James Speight and William D. Norris, arbitrators nominated by the corporation and Willson respectively, and of such third person as the said arbitrators shall by writing under their hands, endorsed on these presents nominate and appoint, so that the said arbitrators or *umpires* make and publish his or their award of and concerning the premises * * on or before the 15th of January next, or such further day as the arbitrators, or any two of them, may from time to time enlarge the time for making the said award, by writing endorsed on this agreement." There was then this further provision :

"And it is hereby further agreed that this agreement shall be made a rule of the Court of Queen's Bench : and further, that in the event of either party disputing the validity of the award, or moving the said Court of Queen's Bench, or *any other Court*, to set the same aside, the said Court shall have power at any time and from time to time to remit the matters referred, or any of them, to the reconsideration of the said arbitrators, with, upon, and subject to directions, powers and terms as to the said Court may seem proper."

The arbitrators afterwards duly appointed George Eakin "the third person or arbitrator, to whom, together with ourselves, all matters in difference within mentioned between the parties shall be referred." The time for making the award was duly enlarged until the 1st of April, 1880.

The arbitrators, in the meantime, proceeded with the reference, and, on the 20th March, 1880, an award, of which a copy was produced, was published, signed by the arbitrators Speight and Eakin only, whereby, after reciting the submission, the arbitrators awarded, of and concerning the said matters so referred, that the corporation was indebted to Willson in the sum of \$1492, and should forthwith allow him that sum in full satisfaction of all claims

of whatsoever kind referred, and in settlement of all accounts, claims, differences, or matters of dispute between them. They further found that Willson had in his hands moneys of the corporation amounting to \$1593.19, and deducting the sum found due to Willson by the corporation from the latter sum, they found that Willson was indebted to the township in the sum of \$101.19, which sum they awarded, and ordered him forthwith to pay to the corporation.

They awarded that all claims by either party against the other were settled in their award, and that neither party had any further or other claims against the other.

June 22, 1880. *Bull* shewed cause, objecting, *in limine*, that the submission gave no right of appeal, and that the Court had therefore no jurisdiction to entertain the application.

Kerr, Q.C., contra, contended that it was apparent from the submission that the intention was to give the right to appeal.

August 28, 1880. *OSLER*, J.—It was not suggested that the reference in this matter came within the arbitration clauses of the Municipal Act R. S. O. ch. 174, (though the arbitrators appear to have assumed that it did, as the award is signed by two of them only,) or that the present motion was made under the 385th section of that Act, which requires the Court to consider not only the legality of the award, but the merits as they appear from the evidence and proceedings.

The objections made to the award, and urged as grounds for setting it aside or referring it back, are such as can be taken by appeal only under the C. L. P. Act, Rev. Stat. Ont. ch. 50, s. 191, and following sections. The rule does not appear to have been drawn up by way of appeal.

The reference is a voluntary reference, and no appeal lies from an award made on such a reference, unless "it is agreed by the terms of the submission that there may be

an appeal to one of the Superior Courts": R. S. O. ch. 50, sec. 205.

It was argued that the submission sufficiently shewed the intention of the parties that there should be an appeal.

The only clause in the submission remotely bearing on the subject is the following [the learned Judge here recited the provision already set out on p. 315]. I cannot possibly hold that this clause confers any right to appeal. It is nothing more than the usual, though now unnecessary clause that the agreement may be made a rule of Court, and that the Court may be moved to set aside or refer back the award. The right to take the new proceeding by way of appeal must, in such a case as this, be conferred by the terms of the submission, and the Court have much larger powers in dealing with such an application than when they are asked merely to set aside or refer back the award.

The proceedings subsequent to the award do not appear to have been conducted as if the parties considered that the award could be attacked by way of appeal, for neither the award nor the evidence seem to have been filed, as the latter should have been where an appeal may be brought.

I have therefore no jurisdiction to hear this appeal, or to set aside or refer back the award on the objections taken, which do not embrace any of the grounds on which, apart from an appeal, an award can be attacked on motion.

Rule discharged, with costs.

IN RE CITY OF TORONTO AND SCOTT.

Reference under Municipal Act R. S. O., ch. 174, sec. 377—Enlarging time.

The Court has power to enlarge the time for making an award, although the same has not been made "within one month after the appointment of the third arbitrator," as required by sec. 377 of the Municipal Act R. S. O. ch. 174.

The general enactments relating to arbitration apply to awards under the Municipal Act.

In extending the time in this case the matters referred were remitted to such persons as the Court should appoint under the Municipal Act, sec. 385.

[September 10, 1880.—*Wilson, C.J.*]

Ferguson, Q. C., moved to enlarge the time for making an award, as the award that was made was not made "within one month after the appointment of the third arbitrator," according to the Municipal Act R. S. O., ch. 184., sec. 377. He filed several affidavits. He referred to *Lord v. Lee*, L. R. 3 Q. B. 404; *In re Warner and Powell's Arbitration*, L. R. 3 Eq. 261; Municipal Act, sec. 385; Common Law Procedure Act, sec. 219; and contended that notwithstanding the limit of time by the Municipal Act for making the award, the award was subject to the jurisdiction of the Courts by the Act; and therefore the Common Law Procedure Act applied to the extending of the time for making such an award, in like manner as to any other award within the jurisdiction of the Courts.

J. K. Kerr, Q.C., contra. There was delay in applying to enlarge the time for making the award. The third arbitrator was appointed on the 9th of December, 1879, on which day the arbitrators had a sitting, and the award was made on the 24th of February, 1880; and on the 4th of June following Mr. Scott had express notice that the award was being resisted by the City for that reason, among others. That time being fixed by statute cannot be enlarged by the Court: *Russell on Awards*, 5th ed., 140, *Skerratt v. North Staffordshire R. W. Co.*, 17 L. J. Ch. 161, 12 Jur. 46. It is the award the Courts have jurisdiction over, and not the submission; and the parties cannot

extend the time for making the award. If, however, the Court could extend the time, it should not be done in this case, where the affidavits shew the arbitrators who join in the award have given a very excessive sum to Mr. Scott, by way of compensation for the land taken from him. He referred to *Ricket v. Metropolitan R. W. Co.*, L. R. 2 H. L. 175; *McCarthy v. Metropolitan Board of Works*, L. R. 7 H. L. 243; *Earl Darnley v. London Chatham and Dover R. W. Co.* L. R. 2 H. L. 43; *Norvall v. Canada Southern R. W. Co.* 41 U. C. R. 195.

WILSON, C. J.—I am of opinion the Court has power, under the Common Law Procedure Act, to extend the time for making the award.

I may add to the cases referred to by Mr. Ferguson *In re Dare Valley R. W. Co.*, L. R. 4 Ch. Ap. 554; *In re Denton and Strong*, L. R. 9 Q. B. 117; *Warburton v. The Haslingden Local Board*, 48 L. J. C. P. 451.

Section 386 of the Municipal Act shews how far the Courts may deal with these municipal awards, by remitting them back, or by taking further evidence, and giving a day for the making of the further or new award.

As every municipal award is to be considered as if made under a submission that the same may be made a rule of Court, the general enactments relating to arbitration apply to such awards.

As to the extension of the time for making the award, I do not think, in the exercise of the discretionary power I possess, I should do so, unless, at the same time, I remit the award, I remit, also, the matters referred to the consideration and determination of such persons as shall be named by the Court, under the Common Law Procedure Act, in pursuance of the Municipal Act, sec. 385.

EMMENS v. MIDDLEMISS.

Inspection of documents—Mortgage.

An action was brought upon the covenant contained in a chattel mortgage which covered goods in the United States, and which was not registered in Ontario.

Held, on an application for inspection of the mortgage, that the Court had power, irrespective of the Common Law Procedure Act, to order inspection of the mortgage in question, or of any document sued upon.

[September 22, 1880.—Mr. Dalton, Q.C.]

Aylesworth moved absolute a summons for inspection of a deed containing the covenant sued on by the plaintiff, filing an affidavit, stating that defendant had no copy of the deed in question; and that it was material and necessary in the interests of the defendant that he should be allowed to inspect the said deed for the purposes of his defence to the action.

J. B. Clarke, shewed cause, filing an affidavit shewing that the deed in question was a chattel mortgage given by the defendant to the plaintiff, and that the indebtedness secured by it had not been paid. He contended that a mortgagee could not be compelled to allow his mortgagor to examine or inspect the mortgage, so long as the mortgage debt remained unpaid. The C. L. P. Act secs. 160, 170, only authorized an inspection in cases where prior to the Act discovery might have been obtained by bill in equity. The chattel mortgage in question covered property situated in the States, and was therefore not registered in Canada.

Aylesworth, in support of the summons, cited *Doe d. Child v. Roe*, 1 El. & Bl. 285; *Price v. Harrison*, 8 C. B. N. S. 617; *Coleman v. Trueman*, 3 H. & N. 871.

MR. DALTON made the summons absolute, on the ground that there was jurisdiction, entirely irrespective of the statute, to order inspection of any instrument on which an action is brought.

HAY V. MCARTHUR

Mortgagor and mortgagee—Ejectment—Concurrent suit in Chancery—Costs.

A mortgagee proceeded in ejectment against a mortgagor, and afterwards filed a bill in Chancery against him for a sale:

Held, that as the mortgagee could since the Administration of Justice Act, R. S. O. ch. 49, obtain in the Chancery suit all the remedies he could obtain in the ejectment suit, the latter should be stayed forever.

[September 20, 1880.—Mr. Dalton, Q.C.]

This was an action of ejectment, brought by a mortgagee against a mortgagor. The plaintiff had, prior to the issue of the writ of summons in ejectment, filed a bill in Chancery, praying a sale of the mortgaged premises in question, together with other lands also mortgaged to him by the defendant, but which were not included in the ejectment writ. The bill in Chancery contained no prayer for the possession of the premises.

H. J. Scott, for the defendant, moved absolute a summons to stay proceedings forever in this action, with costs, urging that it was contrary to the principle that no man should be harassed with two actions for the same cause: that this action of ejectment should not be maintained when the plaintiff could have asked in his bill in Chancery for precisely the same relief as a judgment in ejectment would give him, and could yet readily amend his bill in that respect, if he desired it.

Aylesworth shewed cause, insisting that the plaintiff had an undoubted right to pursue the course he had taken here: that he might also, if he had been so advised, have legitimately brought his action on the covenant in his mortgage, and he pointed out that defendant's relief, if any, was clearly in the Court of Chancery under General Order 455, which provides that when a mortgagee has proceeded at law upon his security, he shall not be entitled to costs of both suits, unless the Court sees fit to order otherwise. Plaintiff would be denied his costs in that

Court if his conduct in bringing two actions was deemed vexatious or oppressive.

MR. DALTON, after reserving judgment and consulting some of the Judges, made the summons absolute, with costs, as asked, holding that since the Administration of Justice Act a mortgagee was not entitled to proceed by bill in equity for foreclosure or sale, and at the same time to maintain ejectment, when possession of the premises could be at once and as readily ordered and obtained by the decree of the Court of Chancery.

BRANNEN V. JARVIS.

Sheriff—Venue.

In an action wherein a sheriff is plaintiff or defendant, the opposite party, if he so desires, may have the action tried in the County adjoining that in which the sheriff resides.

[October 22, 1880.—*Galt, J.*]

This was an action against the Sheriff of York. The present application was made by way of appeal from an order made by Mr. Dalton, changing the venue in this case. The venue was originally laid in the County of Carleton, and Mr. Dalton made an order changing it to Whitby. Against this, the defendant appealed, contending that it ought to have been changed to York, where the cause of action, if any, arose.

Aylesworth for the appeal.

Holman contra.

GALT, J.—I have had the advantage of consulting Wilson, C.J., and the opinion we have formed is that, without laying down any inflexible rule on the subject, it is advisable that where the plaintiff or defendant, as the case may be, wishes the action between him and a sheriff to be tried in an adjoining county to that in which the sheriff resides, his application should be granted. This appeal will therefore be discharged. Costs to be costs in the cause to the successful party.

CHANCERY CHAMBERS.

IN RE ROMANES AND SMITH.

R. S. O. ch. 109, sec. 3.

A. devised land to his executors, "To hold the same in trust for the use and benefit of my son W. during his lifetime, and after the death of my son W. in trust for his heirs, issue of his body, until the youngest of said heirs shall become of age, and then to convey it to said heirs, the children of my said son W., taking equal shares, and the child or children of any deceased child of my said son to take their parent's share in equal proportion."

Held, that W. took only an estate for life, and that the legal estate in remainder vested in the trustees for the benefit of his heirs.

[March 4, 1880.—*Proudfoot, V. C.*]

Black, for the purchaser.

Moss, for the vendor.

PROUDFOOT, V. C.—John Charlton died in 1876, and by his will devised the lot in question to his executors, "To hold the same in trust for the use and benefit of my son William during his lifetime, and after the death of my son William in trust for his heirs, issue of his body, until the youngest of said heirs shall become of age, and then to convey it to said heirs the children of my said son William taking equal shares, and the child or children of any deceased child of my said son to take their parent's share in equal proportion."

The single question is, whether, by the operation of the rule in *Shelley's Case*, William took an estate tail.

This rule, shortly expressed, is that where the ancestor takes an estate of freehold by any instrument, and in the same instrument an estate is limited by way of remainder,

either mediately or immediately, to his heirs in fee or in tail, the word heirs is a word of limitation, not of purchase, and the ancestor takes an estate in fee, or in tail, as the case may be: 2 Jarm. 306. The rule applies to equitable as well as legal interests, but the estate of the ancestor, and the limitation to the heirs, must be of the same quality, *i. e.*, both legal or both equitable: *Ib.* 308. It is a rule of tenure, which is not only independent of, but generally operates to subvert, the intention; so that no words, however positive negativing the continuance of the ancestor's estate beyond the period of its primary express limitation, will exclude the rule. And, in like manner, a declaration that the heirs shall take as purchasers, is equally inoperative: *Ib.* 311, 313.

It seems clear that the limitation to the use of William during his life is a use executed in him, and that he has the legal estate for life: but it was argued that, under the trust for the heirs, they took only an equitable estate, and therefore that the will did not apply.

When an estate is given to trustees to receive the rents and pay them to the beneficiary, the trustees take the legal estate to enable them to perform the trust; but if the estate is given to them to permit another to receive the rents the beneficial devisee takes the legal estate and not the trustee. This miraculous distinction, as Sir James Mansfield termed it, is too firmly established to be questioned: *Doe v. Biggs*, 2 Taunt. 109; or as stated by Mr. Lewin (*Trusts*, 5th ed. 247), if any agency be imposed on the trustee as by a limitation to the trustee to convey the estate, the statute of uses does not apply, and the legal estate is vested in the trustee. This was the case in *Doe Shelley v. Edlin*, 4 A. & E. 582. And where an estate was limited to the trustee to permit tenant for life to receive the rents during his life, and on his death to convey to another in fee, the legal estate during the life of the tenant for life is vested in him, and the remainder in the trustees: *Doe dem. Noble v. Bolton*, 11 A. & E. 188; *Adams v. Adams*, 6 Q. B. 860. And where an estate was devised to

a trustee to pay the rents to the tenant for life, and on his death the estate was devised to another in fee, the legal estate was vested in the trustees for the life of the tenant for life, and that in remainder in the tenant in remainder: *Adams v. Adams, supra*; *Cooke v. Blake*, 1 Ex. 220.

It is true the estate in remainder in these cases seems to have been limited to strangers, but I see no reason why the same rule should not apply if they were heirs. The estate does not pass from the trustees because they have a special duty to perform, not on the ground of any distinction in the character of those in remainder. There are, therefore, estates of different kinds in the tenant for life and those in remainder, and the rule in *Shelley's Case* does not apply.

If the rule does not apply, then the difficulty is not one of conveyance, as was argued, but of title. The *cestui que trust* cannot call for the conveyance of a larger legal estate than he has equitable. Here his estate is a legal one, and he has no equitable one. The equity is in the heirs as purchasers: *Lewin*, 5th ed., 595.

On behalf of the vendor, I was referred to *Tunis v. Passmore*, 32 U. C. Q. B. 419. But the devise there was to the trustees "in trust for the only benefit of my grandson, R. Bostwick, for and during the term of his natural life, without impeachment of waste, and from and after the determination of that estate, in trust for the heirs of the body of him, the said R. B.," and it was held that R. B.; took a legal estate tail. The devise created a simple trust upon which the statute of uses operated: there was no agency or duty in the trustees to prevent its application. *Broughton v. Langley*, 2 Salk. 678; *Curtis v. Price*, 12 Ves. 89; and *Nash v. Coates*, 3 B. & Ad. 839, do not affect the question in this case.

I determine, therefore, that William, the son, took only an estate for life, and that the legal estate in remainder is vested in the trustees, for the benefit of his heirs.

WRIGHT V. WAY.

Supplemental answer—Time—Matter introduced.

The bill alleged that defendant had given the plaintiff certain notes on account of the purchase money of a vessel, and a mortgage on the vessel as collateral security. Defendant's answer, filed in November, admitted this allegation, which was denied by his co-defendant. In March he applied for leave to file a supplemental answer, withdrawing this admission, and setting up that the notes were given for plaintiff's accommodation, and denying the allegation as to the mortgage. His affidavit stated that he had forgotten the facts, which occurred some years since, when he swore to his answer, and he only remembered them on having a conversation with his co-defendant. The application was refused.

[March 11, 1880.—*The Referee.*]
[April 5, 1880.—*Blake, V.C.*]

The bill filed alleged that the defendant had given to the plaintiff certain promissory notes, in part payment of the purchase money of a vessel in question herein, and had given a mortgage on the said vessel as collateral security for payment of these notes, and containing a covenant for payment of the amount covered by these notes.

The answer of the defendant Honey admitted this allegation, which was denied by his co-defendant. This answer was filed in November, 1879.

The defendant Honey on the 9th of March, 1880, applied for leave to file a supplemental answer, withdrawing this admission and setting up that the notes were given for the accommodation of the plaintiff, and that there was an agreement that no liability in respect of them should ever be enforced against the defendants, and denying that the mortgage was given as collateral security.

An affidavit was filed by the applicant, to the effect that he had forgotten the facts of the case when he swore to his former answer, as the facts had occurred some years ago, and he had only remembered them on having a conversation with his co-defendant in the beginning of February.

Mr. McPhillips. (Cameron & Appelbe,) for the applicant, relied upon the facts shewn in the affidavit.

Mr. *Hoyles* contended that the delay in moving was fatal ; that a supplemental answer is not allowed to be filed to withdraw admissions made in a former answer : *Daniels*, p. 681 ; *Torrance v. Crooks*, 1 E. & A. Rep. 240 ; *Lindsey v. Wilson*. 1 V. & B. 149 ; *Greenwood v. Atkinson* 4 Sim. 61, 64. That the explanation of the alleged mistake was most unlikely and improbable.

THE REFEREE refused the application.

The defendant then appealed, and the appeal came on before Blake, V.C., on the day before the hearing term, for which the case was set down opened.

Mr. *Appelbe* appeared for defendant.

Mr. *Hoyles* appeared for plaintiff.

BLAKE, V.C.—I think the appeal is too late. The defendant knew of the matter now brought forward in the Court in February. I am not at all satisfied with the explanation given, and I think the Court should not allow a defendant to vary his answer unless a mistake or misapprehension is clearly made out, and some reason assigned for this existing.

I dismiss the application, with costs, without prejudice to any application to be made before the Chancellor at the hearing.

WRIGHT v. WAY.

Notice of examination and hearing—Time—Practice.

Notice of examination and hearing was served at a few minutes past four, on the last day for giving notice on solicitors of one defendant, who admitted service, but on the same day, discovering that the notice had been served too late, they wrote to the plaintiff's solicitors repudiating their admission, and saying that they would move to set aside the notice.

On such a motion it was not shewn that there was no other service or notice than as above mentioned, and the application was thereupon refused : *Scott v. Burnham*, 3 C. C. 402, followed.

Semble, that the acceptance of service would not be binding, having been so soon repudiated.

[March 31, 1880.—*The Referee.*]

[April 5, 1880.—*Blake, V. C.*]

This was an application by the defendant Honey to set aside the notice of hearing and examination served herein on the 22nd of March for the Cobourg Sittings, commencing on the 6th of April, and to strike the cause out of the list of causes for said sittings.

The notice had been received by the defendant's solicitors a few minutes after four o'clock on the last day for giving notice, but an admission of service was made by them before this fact was noticed. As soon, however, as it was discovered a letter was written to the plaintiff's solicitors repudiating the admission, and informing them a motion would be made to set the notice aside.

Mr. *McPhillips*, (Cameron & Appelbe,) for the defendant Honey, read affidavits setting out the facts as above, and argued that since the notice was late the order requiring fourteen days' notice of hearing had not been complied with, and cited G. O. 163 & 411, and the following cases in support of the application : *Beard v. Gray*, 3 C. C. R. 104; *McTavish v. Simpson*, 7 Pr. R. 145, 13 L. J. 197.

Mr. *Hoyles*, for the plaintiff, objected that the motion was not properly framed, and should have been to set aside the admission of service ; that there was no evidence that a good notice had not been served : *Scott v. Burnham*, 3 C. C. R. 402. That defendant Way had not been served with

notice, and no order could be made as asked in his absence. Plaintiff's affidavit shews his debt will be lost if cause postponed, which would be a ground for changing the venue in order to speed the cause, and therefore the motion should not be granted.

THE REFEREE refused the application, with costs to be costs in the cause to the plaintiff in any event.

The defendant appealed, and the appeal came on for hearing before V. C. Blake, on the day before the sittings at Cobourg, for which the cause had been set down.

Mr. Appelbe, for the defendant Honey.

Mr. Moss, for the plaintiff.

BLAKE, V. C.—*Scott v. Burnham* seems to decide a very nice point, and, it appears to me, it goes a considerable distance to advance justice, and I gladly follow it here.

I cannot strike the cause out, following *Scott v. Burnham*, as a good notice may have been given. Nor can I set aside the notice because the copy served was too late, as there may have been another service. There is evidence to shew that it was too late, but there is no evidence to support the notice (*i. e.* of the present motion) as it is given. I do not think the acceptance of service could bind, since it was so speedily repudiated.

I refuse the application, with costs.

RE DRAGGON—DRAGGON v. DRAGGON.

RE DRAGGON—ABELL v. DRAGGON.

Administration—G. O. 638, who entitled to.

A creditor of an intestate served notice of motion for an administration order under G. O. 638, on D.'s widow and administratrix. The widow then served a similar notice upon the heirs of her husband, and filed affidavits alleging a deficiency of the personalty to pay debts; that creditors were suing, and also filed a consent of the adult heirs to an order in her favour.

The Master at Chatham granted an administration order to the widow, and, on appeal, PROUDFOOT, V.C., held that he was right.

[March 22, 1880.—*Proudfoot, V.C.*]

Riordan, for the creditor, appellant.

Hoyles, for the administratrix, respondent.

This was an administration matter, in which one Abell, claiming to be a creditor of the intestate, served a notice of motion for an administration order upon the widow and administratrix of the intestate. After the service of such notice the widow also served notice of motion (returnable at a later day than Abell's notice) upon the heirs of her late husband, and filed affidavits shewing a large deficiency of personalty to pay debts: that creditors were pressing, and that some had commenced suits to enforce payment of their claims; and also filed consents of the adult heirs to an order being made in her favour.

On Abell's motion coming on to be heard, it was adjourned, at the instance of the administratrix, until the return day of her notice of motion.

The two applications came on together before the Master at Chatham, who decided in favour of the widow, and issued the order to her, holding, under the authority of *Penny v. Francis*, 7 Jur. N. S. 248, that she, being interested in the residue, was most likely to conduct the suit economically and properly.

Abell appealed from the order of the Master, and the appeal came on before PROUDFOOT, V.C., on Monday, the 22nd of March, 1880.

Mr. Riordan, for the appellant, contended that as his application was prior in date, the order should have been given to him; and that the widow being personal representative, could not obtain an order for administration: *Re Shipman*, 24 Gr. 177; *Re Jack*, 13 L. J. 358; *Marsh v. Marsh*, 7 P. R. 129.

Mr. Hoyle, for administratrix, relied upon *Penny v. Francis*, 7 Jur. N. S. 248; *Perrin v. Perrin*, 3 C. C. R. 452, as to conduct of proceedings, and upon *Re Ette*, 6 P. R. 159; *Re Bromley*, before V. C. Blake, 28th January, 1878, and *St. Michael's College v. Merrick*, 1 App. R. 530, as an answer to the second objection.

PROUDFOOT, V. C., dismissed the appeal, with costs, holding that the Master was right, under *Penny v. Francis*, in giving the conduct of the proceedings to the administratrix, and that the decisions relied on by the appellant in support of his second ground must be now considered as modified by the decision of the Court of Appeal in *St. Michael's College v. Merrick*; and that a sufficient ground was shewn in this case for the application of the administratrix being granted. He allowed Abell to add the costs of his application for administration to his claim, if he established any.

NELSON v. DAFOE.

Writ of arrest

A writ of arrest will not be granted against the purchaser in a suit for specific performance, unless it be shewn by affidavit that the vendor's lien is insufficient.

[June 5, 1880.—*Proudfoot, V. C.*]

This was a bill for specific performance, filed by the vendor. By the decree the plaintiff was declared entitled to a lien upon the land for the amount of the purchase money, and the defendant was ordered forthwith to pay the plaintiff \$312.50 and interest. In default of payment within one month, a sale was ordered.

The plaintiff now applied *ex parte* for a writ of arrest upon his own affidavit of belief, that the defendant was about immediately to quit the Province to avoid payment of the amount ordered by decree to be paid; and that he had made sale of all his effects with this intent. Writs of execution had been issued under the decree against the goods and lands of the defendant, and were lodged in the hands of the sheriff, and there remained unsatisfied.

Seton Gordon, for the plaintiff. This application is based on sections, 5, 7, 8, and 10, of R. S. O., ch. 67. It is submitted that plaintiff, by proving his judgment, and proving to the satisfaction of the Court that there is cause to believe that defendant, intending to defeat execution, will, unless apprehended at once, leave Ontario, has placed himself within the Act. Although the suit is for specific performance, and the bill declares a lien, this has been held to make no difference: *Boehm v. Wood*, T. & R. 332, vol. 1; *Goodwin v. Clarke*, 2 Dick. 497. The only doubt raised in such cases has been, where, the application being made before decree, it was not established that the Court would finally grant specific performance: *Raynes v. Wise*, 2 Mer. 472. Here the plaintiff has his decree for immediate payment, which is a judgment, and has executions upon it in

the sheriff's hands. The lien makes no difference : *Morris v. McNeill*, 2 Rus. 604. The analogous statute in England is "The Debtors' Act, 1869." The 6th section is in almost the words of the Provincial Act. Under the former was decided *Sobey v. Sobey*, L. R. 15 Eq. 200, which declares that even a decree of the Court for payment of money will be enforced, if necessary, by a writ of *ne exeat*; and that the only facts to be established to secure the interposition of the Court are, that there is a judgment, and that the debtor is about to depart.

PROUDFOOT, V. C.—This is the first application of the kind that has come under my notice. The majority of the cases cited were decided at a time when the English law on the point was different from our present law. The letters set out in the affidavit, together with the allegations connected with them, leave no doubt in my mind as to the intention to quit the jurisdiction; but in suits for specific performance, I think it must still be shewn that the liens of the plaintiff upon the lands is insufficient for his protection.

Order refused.

McKAY v. Mc KAY.

Partition—Creditors—Costs allowed.

An order for partition or sale was made under the recent G. O. 640, by the Master at London, of the estate of one M., deceased. In proceeding under that order the Master advertised for creditors, and M. & M. sent in a claim for obtaining letters of administration and for defending an action in the Court of C. P., brought by W. M., a defendant in this suit, and entitled to a share of the estate *v. the administratrix*. The Master allowed the claim and W. M. appealed, on the ground that neither the deceased nor his estate was indebted to M. & M., and that they were not entitled to prove as creditors in this cause, *Held*, that she was justified in defending the suit, and the appeal was dismissed.

[June 5, 1880.—*Proudfoot, V. C.*]

The facts sufficiently appear in the judgment.

Hoyles, for the appellant.

R. Meredith, for Meredith & Meredith, the creditors.

PROUDFOOT, V.C.—An order for partition or sale was made under the recent general order, by the Master at London, for the partition or sale of the estate of John McKay, deceased. In proceeding under that order the Master advertised for creditors, and among the claims sent in was one of Messrs. Meredith & Meredith, solicitors, consisting of charges for obtaining letters of administration, and for defending an action in the Court of Common Pleas against the administratrix. The plaintiff in that action was the present appellant, William McKay, a defendant in this suit, and entitled to a share of the estate. The Master has allowed the claim. William McKay appeals because the deceased was not, nor is his estate, indebted to Messrs. Meredith & Meredith in any sum whatever, and they are not entitled to prove as creditors in this cause.

Upon the argument it was contended that the debt was a personal one of the administratrix, not a debt of the estate ; that in the action at law the administratrix pleaded *plene administravit*, which the plaintiff admitted, and from that moment she had no right to proceed farther with the

defence, or incur any further costs, as she had nothing to do with the real estate, and a judgment against her could only be *prima facie* evidence against the heirs ; or, at all events, she should not have continued the defence without obtaining the sanction of the heirs.

I apprehend that the solicitors are entitled in this proceeding to prove for any claim that would be a proper charge against the estate : 2 *Williams*, on Executors, 992 ; and all reasonable expenses which have been incurred in the conduct of his office are allowed to an executor or administrator; and this applies to costs properly incurred : 2 *Williams* on Executors, 8th ed. 1860, *et seq.* It is true enough that, in a suit or action by a third party against an administrator, the liability to costs will, generally speaking, be governed by the ordinary rule, which throws them on the unsuccessful party ; but this does not prevent him reimbursing himself out of the estate : *Ib.* 2042.

Then, were the costs properly incurred ? When the action was brought against her she was obliged to defend herself, and, so far as she could, to defend the estate. She defended herself by the plea of *plene administravit*, the truth of which was not doubted, and to that extent she is clearly entitled to her costs. But beyond this she had a duty to discharge to the estate. By a judgment against her in the action at law the lands would have been reached and sold upon an execution. It was her duty to prevent this unless she took upon herself to assume that the plaintiff was justly entitled to succeed, or unless those entitled to the real estate requested her not to continue the defence. It is said that the judgment in that action would only be *prima facie* evidence against the heirs : *Eccles v. Lowry*, 23 Gr. 167. If it were evidence at all against them it imposed upon her the duty of defence. The action was brought by one of the heirs asserting a claim that, if successful, would have swept away the whole estate, and it would have been very convenient for him if the administratrix had held her hand as soon as she pleaded that she had fully administered, and allowed him to recover at law

and carry off the estate. The character of the plaintiff as an heir, it seems to me, rendered it even more plainly her duty to require him to prove his claim.

If, however, it were necessary that the administratrix should have been asked by the heirs to defend, it is in evidence that some of the heirs desired the action to be defended. Of course, as the plaintiff was himself an heir, it could not be expected that she would have his approval to defend the action brought by him. I think she had all the authority requisite to justify her in continuing the defence, if authority were needed.

The appeal is dismissed, with costs.

SCOTT v. VOSBURG.

Timber on mortgaged property—Sale of by third party—Proceeds, to whom payable.

The first of three mortgagees having filed a bill for sale, the other two proved their claims in the suit. No one redeemed by the day appointed, but a final order for sale was not taken out, because one V., who had purchased the equity of redemption, was negotiating with S. the third mortgagee. During these negotiations V. cut and sold a large quantity of the timber on the land to G., wherenpon S. filed a bill praying payment by G. of the price of the timber, which had not yet been paid over. Held, affirming the Master's ruling, that the first mortgagee was entitled to it.

[June 5, 1880.—*Proudfoot, V.C.*]

The bill was filed by the third mortgagee of the land in question, and prayed payment to him of the price of certain timber cut and sold by the owner of the equity of redemption.

The decree directed a reference to the Master, who found the first mortgagee entitled to the proceeds of the timber. The plaintiff appealed.

Roaf, for the plaintiff.

Defoe, for the first mortgagee.

Eddis, for the defendant.

PROUDFOOT, V. C.—Appeal from the Master in Ordinary—because, under the circumstances stated below, he had held that the proceeds of timber cut by Vosburg, and sold to Gooderham & Worts, were payable to Mrs. Hayden, the first mortgagee.

There were three mortgagees on the property, the first to Mrs. Hayden, the second to Cruso, and the third to Scott the plaintiff in this suit.

Mrs. Hayden instituted a suit for the sale of the property, to which the other mortgagees were parties, and proved their claims, and the 30th December, 1879, was appointed for redemption. No one redeemed her, but the final order for sale was not taken out, because some negotiations were pending between Vosburg, the purchaser of the equity of redemption, and the solicitors for Scott, as to Scott's becoming the sole mortgagee of the property.

Pending these negotiations Vosburg cut a large quantity of timber, and sold it to Gooderham & Worts, of which neither the solicitors for Mrs. Hayden nor for Scott seem to have been aware, till the 2nd of February, 1880. Scott's solicitors wrote to Vosburg, who came to see them on the 5th of February, and there met the solicitor for Mrs. Hayden, and a discussion took place between them as to the carrying out of Vosburg's purchase. Nothing was definitely arranged, Vosburg agreeing to call next morning. This appointment was not kept. Vosburg says he went to the office, but did not find the solicitor; and Scott that day filed this bill and obtained an injunction to restrain the cutting of timber by Vosburg, and also the payment over by Gooderham & Worts of the money in their hands, the price of the timber bought from Vosburg.

The plaintiff insists that he is entitled to the money: that when he took proceedings the timber had become chattels, not affected by the Registry law, and that by superior diligence having secured the money, he ought not to be deprived of the benefit of it,

I think the Master came to the correct conclusion, and that the first mortgagee is entitled to the money after payment of costs.

The Master rested his decision on the cases of *McLean v. Burton*, 24 Gr. 136; and *Brown v. Sage*, 11 Gr. 239; which the counsel for the appellant distinguish, because there the contracts were for the sale of standing timber, and clearly within the Registry law. But this distinction does not amount to a difference. The ground upon which the plaintiff obtained his injunction and order for payment was, that he was a mortgagee of the land of which this timber had formed a part—it was not a mere chattel.

Being a party to the suit of Hayden (independently of the question under the Registry law) he knew of her mortgage, and that it was prior to his own; that the legal property in the timber had passed to her; and that under certain circumstances she had the right to restrain the cutting, and the removal of it, and to follow it.

I have some doubts whether Mrs. Hayden was entitled to this money, because her right to the timber was a qualified one; she could not prevent the mortgagor or owner of the equity of redemption from cutting the timber unless the effect would be to render the security insufficient for her claim, and I do not see that evidence has been given to shew that the security was thereby rendered deficient. It is not a ground of appeal, however, that the Master has erred in this respect; and it would appear from *McLean v. Burton* that the burden of shewing the sufficiency is cast upon the mortgagor, (or Scott claiming through him and insisting upon this right). I think it ought to be assumed that the Master had sufficient evidence to justify his findings when not complained of on that ground; and that everything before him *rite esse acta* when not impeached.

There are some cases where parties have had the benefit of superior diligence, where they have got in a legal estate to fortify their security, as in *Butes v. Brothers*, 2 Sm. & Giff. 509, but the rule could not apply to protect a gain obtained from property to which another was entitled, as in this case, with full knowledge of the right of that other.

If the claim of the plaintiff in this suit were to succeed,

it would provide a very simple and easy method for puisne mortgagees to get satisfaction of their debts to the prejudice of prior incumbrancers.

It is not to be forgotten, also, that the proceedings of Mrs. Hayden in her suit were suspended to await the result of negociation between Vosburg and the plaintiff in this suit, and that in consequence of them she deferred taking out the final order for sale.

I dismiss the appeal, with costs.

MACDONELL V. MCGILLIS.

Jurisdiction of Master under G. O. 640—Question of title raised.

The jurisdiction created by G. O. 640 is intended to be exercised in simple cases only where there is no dispute. Where questions are raised of title, or the like, a bill must be filed.

[June 8, 1880.—*Blake, V. C.*]

The plaintiff had served a notice for partition or sale under General Order 640, returnable before the Master at Cornwall. Before the notice was returned it became apparent from the evidence filed in answer, that the defendants intended to dispute the plaintiff's right to the partition and to any interest in the lands in question. The plaintiff now applied in Chambers, upon notice to all parties, for an order to vacate or stay all proceedings under the first notice, for his costs of the same, and for leave to file a bill for partition, alleging that he was unaware that defendants intended to dispute his title until the evidence in answer was put in.

Blain, for the plaintiff. It has been understood that the General Order is intended to apply to simple cases only, as where the parties consent to the order, or where no doubt exists, and that where a contest such as is involved, where a question of title arises, as in this case, a

bill must be filed. The case of *Heywood v. Sivewright*, 8 P. R. 79, would seem to support this view; and an analogy might be found in the old practice of requiring a bill instead of a Chamber application in adverse suits in all but simple cases.

Hoskin, Q. C., for the infants, and,

Cattanach, for the adult defendant, offered no objection.

BLAKE, V. C.—Made the order asked, reserving costs of the proceedings before the Master, and of the application, until the hearing or other disposition of the suit.

RE CURRY, WRIGHT v. CURRY.

CURRY v. CURRY.

Payment by executor into Court—Admission—Practice—Jurisdiction of Referee.

The Referee in Chambers has no jurisdiction to make an order for payment into Court by an executor or administrator of amounts admitted by him to be in his hands.

[June 30, 1880.—*The Referee.*]

This was a motion to extend the time for making the Master's report, and to compel the defendant, Christopher Curry, to pay into Court certain moneys alleged to be admitted by him to be in his hands.

This was an administration matter. By the accounts brought into the Master's office by the defendant Christopher Curry, the administrator of the intestate, Philip Curry, the sum of \$277.39 appeared to be in the defendant's hands.

In the course of the investigations in the Master's office the plaintiffs sought to charge defendant with half the purchase money arising from the sale of certain lands, which the plaintiffs alleged to have been held by the de-

fendant and the intestate as tenants in common. The Master held that he could not under the common administration order entertain this question, and the suit of *Curry v. Curry* was instituted by the plaintiffs in *Re Curry* against the administrator, to have it declared that the lands were held in common. The defendant in his answer in that suit admitted that the lands had been sold, and the purchase money, \$1,500, paid to him, but claimed to be solely entitled.

The decree in that suit was in favour of the plaintiffs' contention. The plaintiffs now contended that they were entitled to have \$750, half the purchase money, paid into Court on the admission in the defendant's answer; also \$180, half the rents and profits received by defendant, and \$212.73 for interest on the above three sums.

The Master had not yet made his report.

N. W. Hoyles, for the plaintiff, read affidavits to shew that the defendant was making away with his property, and contended that the admissions of defendant were sufficient to entitle the plaintiffs to have the above sums paid into Court forthwith. He cited *London Syndicate v. Lord, L. R. 8 Chy. 4.*

T. Langton, for the defendant. The motion cannot be made in Chambers, *Re Babcock* 8 Gr. 409; *Collins v. Orme*, 3 Chy. Ch. 70, where the report erroneously states that the motion was made in Chambers. As to the sums of \$750 and \$180 the admission is not the unqualified admission upon which the Court acts: *Richardson v. The Bank of England*, 4 M. & Cr. 176. After decree the Court does not act on an admission in the answer, and no account of amount due under decree had been taken: *Binns v. Parr*, 7 Ha. 288; *Wright v. Lukes*, 13 Beav. 107. The claim of \$212.73 for interest will not be ordered into Court: *Woods v. Downes*, 1 V. & B. 49. As to the \$277.39, the accounts have not been completed, the defendant claims to be allowed further payments, commission, and costs of this suit. Under such circumstances the Court

will not order payment in : *Anon.* 4 Sim. 359 ; *Re Babcock*, 8 Gr. 410 ; *Collins v. Orme*, 3 Chy. Ch. 70.

THE REFEREE.—Held that he had no jurisdiction under the circumstances to make the order asked, and dismissed the motion with costs so far as it was for payment into Court.

IN RE SELBY.

Money in Court—Jurisdiction of Referee.

Where money is paid into Court under an order giving leave to “*apply at Chambers*” for its payment.

The Referee has jurisdiction to make the order for payment out.

[June 5, 1880.—*The Referee.*]

This was an application by the widow and executrix of the late Mr. Selby to have the proceeds of a policy upon his life paid into Court: the assured having disappeared mysteriously in the early part of 1873.

The Court made an order (following orders made by the English Court of Chancery in a similar case) directing the money to be paid into Court, with leave to the executrix to “*apply at Chambers*” for payment to her.

On 3rd June, 1880, *A. Creelman* applied on behalf of the executrix for payment, seven years having elapsed since the disappearance of the assured.

W. F. Burton, for the Canada Life Assurance Company, consented, citing *Doe dem. Haggerman v. Strong*, 4 U. C. Q. B. 510.

THE REFEREE thought the application should have been made before a Judge in Chambers; but, after consulting with the Vice Chancellor who made the order, held it was not necessary; and granted the order here asked for.

DUNNARD V. MCLEOD.

Time to appeal—Practice.

Where a solicitor's clerk, through forgetfulness, neglected to set down an appeal as required by G. O. 642, the Referee refused to extend time for appealing; and On appeal, SPRAGGE, C., upheld his ruling.

[*The Referee.*]
[Nov. 1, 1880.—Spragge, C.]

The defendant moved to dismiss for want of prosecution.

The Referee, upon the undertaking of the plaintiff to speed the cause, dismissed the application upon payment of the costs by the plaintiff. This order was issued on the 15th October, 1880.

The defendant gave notice of appeal therefrom for Monday the 25th October.

When the motion came on, it appeared that the case had not been set down as required by the general orders, and the action dropped, the defendant's solicitors refusing to consent to allow the case to be set down *nunc pro tunc*.

The defendant then moved, on notice before the Referee, on the 26th October, 1880, for an order extending the time for appealing from his former order.

It appeared by affidavit of the Toronto agents for the defendant's solicitors, that a clerk in his office had been instructed at the proper time to set the case down, but that he neglected to do so, and stated, when questioned about it, that he had forgotten it.

THE REFEREE, following *Gould v. Rich* (a), before

(a) In *Gould v. Rich*, the vacation was enlarged until 1st September. The solicitor supposing that vacation ran for all purposes, and that he had till after 1st September to set down the appeal from the report, did not set the same down. On discovering his error he applied before the time had elapsed when the case would have been argued, had it been set down properly, for leave to set it down *nunc pro tunc*, or for time to be extended. THE REFEREE allowed the application. *Hoyle*s appealed. On appeal, SPRAGGE, C., reversed the order of the Referee.

Spragge, C., in appeal, in October, 1880, refused the rule asked.

The defendant appealed from this order.

G. B. Gordon, for the appeal, argued that while in *Gould v. Rich*, the laches on the part of the solicitor, were due to a mistaken view of the practice, in this case it was a mere slip on the part of the solicitor, or rather his clerk, and cited *Burgoine v. Taylor*, L. R. 9 Chy. Div. 1, where in appeal it was held that a slip, on the part of the solicitor, was a ground for the exercise of the indulgence asked.

G. M. Rae, for the respondent, was not called upon.

SPRAGGE, C., remarked upon the apparent variableness of the recent English practice, and declined to follow the case cited. He held, that as the ultimate object of this motion was to secure the dismissal of the plaintiff's bill, he did not feel bound to grant the defendant the indulgence asked.

COMMON LAW CHAMBERS.

REGINA v. HOVEY.

Extradition—Forgery—Evidence.

A prisoner was committed for extradition to the United States on a charge of having forged a resolution of a city council as to the issue of bonds, of having forged a bond of said city, and of uttering the same :

Held, on an application for his discharge, that the resolution being an essential preliminary to the issue of the bond, and the bond being an instrument which might be the subject of forgery, although not executed in strict accordance with the code of the State in which the bond was issued, there was a *prima facie* case made out against the prisoner, and that he should be remanded as to the charge of forgery.

Held, also, that the evidence against the prisoner of having uttered a forged instrument not being otherwise sufficient, the Court could not look at an indictment against him found by the Grand Jury of an American Criminal Court.

[July 14, 1880.—*Osler, J.*

The prisoner was brought up on a writ of *habeas corpus* granted by Galt, J., directed to the sheriff of the county of Elgin. The writ and the return thereto having been filed, and the evidence and the depositions returned upon a writ of *certiorari* having been also filed, application was made for the prisoner's discharge.

Robinson, Q. C., for the prisoner.

Stanton (St. Thomas), shewed cause,

From the return to the writ of *habeas corpus* it appeared that the prisoner had been committed for extradition to the United States by the County Judge of the county of Elgin, and was in the custody of the sheriff of that county

under two warrants issued by the learned Judge, bearing date the 5th day of April, instant, "there to remain until surrendered according to the stipulations of the treaty between Her Majesty the Queen and the United States of America, for the apprehension and surrender of fugitive felons, signed at Washington on the 9th August, 1842, and recited in the Act passed to give effect to the said treaty ; or until discharged according to law."

The warrants and proceedings were regular in form, the Canadian Extradition Act of 1877, 40 Vict. ch. 25, D, not having yet come into operation. *Re Williams*, 7 Pr. R. 275.

The charges on which the prisoner was committed were forgery and uttering forged paper. The instruments with the forgery of which the prisoner was charged, were:

(1) A resolution of the City Council of the city of Urbana, in the State of Ohio, passed on the 10th March, 1871, by which the council determined to issue city bonds or debentures to an amount not exceeding \$15,000, (fifteen thousand dollars), the latest to fall due at a period not to exceed five years after the 1st March, 1874, all bearing eight per cent. interest. It was charged that the prisoner had feloniously altered this resolution in the words and figures so as to make it read as a resolution for the issue of bonds to the amount of \$50,000, (fifty thousand dollars).

(2) An instrument purporting to be a bond of the city of Urbana, bearing date the 1st February, 1879, for the sum of five hundred dollars, payable with interest at 8 per cent. on the first day of October, 1888. This bond purported to be under the common seal of the city of Urbana, and to be signed by the prisoner as city clerk, and by Mr. B. F. Dixon, the president of the council.

The other charge was for feloniously uttering the last described bond, knowing it to be forged.

It appeared from the depositions that the city of Urbana was a municipal corporation in the State of Ohio, and that the prisoner had been city clerk of such city from about the 1st of April, 1869, until the 23rd October, 1879, when he absconded from the United States to this country. As

city clerk, the prisoner had sole custody of the city seal, and of the blank forms of the bonds which might be, from time, issued by the corporation.

As to the charges of forgery, it was objected on behalf of the prisoner (1) as regarded the resolution (*a*) that it was not an instrument of which the crime of forgery could be committed, and (*b*) that there was no evidence that the alterations had been made by the prisoner. (2) As to the bond, objection was taken (*a*) that as by the municipal code of Ohio it was required that all such securities should be signed by the mayor, the instrument having been signed by the president and an other official having different duties, was, on the face of it, void and invalid for any purpose; (*b*) and that there was no sufficient evidence that the forgery had been committed by the defendant.

OSLER, J. - I am of opinion that the evidence well warrants the extradition of the prisoner upon the charges of forgery.

All that the treaty requires is, that there shall be such evidence of criminality as according to the laws of the place where the fugitive or person charged shall be found, would justify his apprehension and commitment for trial, if the offence or crime had been there committed.

As to the resolution, the prisoner had the custody and control of the minute book in which it was entered. The entry thereof was in his handwriting. It is distinctly proved that it has been altered: that it was altered before the defendant absconded; and a person who knows the handwriting of the prisoner swears that the original record of the resolution in the minute book is in his handwriting, and that the alterations and changes in the record appear to have been done by the same hand which entered the original record. It also appears that the city should owe and have outstanding a bonded debt to the amount of \$16,100, and no more, and that valid legal and genuine bonds to that amount should be outstanding: that upon an examination of the financial affairs of the city made after

the prisoner's departure, all persons holding bonds issued by the city were notified to present them, so that a proper registry of the same, with date of issue, time of maturity, &c., might be made; and that in compliance with such notice, what purported to be genuine bonds of the city to the amount of over \$51,000, were presented, besides interest coupons representing further bonds to the amount of \$14,000, making the aggregate of outstanding bonds to the amount of \$65,000.

The instrument is one which might be the subject of forgery under the 45th section of our Act respecting forgery. The evidence is that such a resolution was an essential preliminary to the issue of any bonds, and the case is quite distinguishable from that of the *Queen v. Winsor*, 6 B. & S. 143; where the act of which the prisoner was guilty was really only that of making a false entry, a very different thing from the offence of forgery.

As to the bond, there is abundant evidence to shew that the signature of Mr. Dixon, the president of the council, which purports to be set thereto, is a forgery, and a witness states that he is well acquainted with the handwriting of the prisoner, and believes that the signature B. F. Dixon, to the said bond, was written by the prisoner.

Several witnesses depose that the bond bears the appearance of a valid and regular bond of the city, and that bonds executed as this one purports to be executed, viz., by the president and city clerk, have been issued and paid, and that it was not until after the present difficulty arose that they had been executed by the mayor in accordance with the assumed requirements of the code. There is evidence of an expert that bonds so executed, *i. e.*, by the president of the council, would be valid. The opinion of another expert is contrary to this view, but I understand them both to agree that if this bond had really been executed by the president, and was for that reason not a valid security as against the city, the president would be personally liable upon it. In this view the prisoner forging the president's name to such a security would be guilty of the

crime of forgery, as having made a false instrument upon which, had it been genuine, some one would have been liable, with intent to defraud or deceive.

But independently of this, it is shewn that the city bonds have been executed in the same manner as the bonds now in question for several years, and their validity never disputed, and that in the opinion of respectable professional men they are valid and legal bonds, notwithstanding that they are signed by the president of the council instead of by the mayor.

If by reason of this mode of execution, the bond would not be a valid legal instrument upon the true construction of the sections of the code of Ohio, which have been referred to, and a forgery of it so executed therefore not in law a forgery at all, I think we should nevertheless leave that question to be raised in and determined by the American Court. There is at all events evidence that a bond executed as this one has been is a valid one, and all that I have to decide is, whether a *prima facie* case has been made out against the prisoner.

I think that such a case has been fairly established.

As to the charge of uttering the bond, the case is one of grave suspicion against the prisoner, but I am obliged to say that the evidence, in my opinion, falls short of establishing the charge.

An indictment has, however, been found against the prisoner by the grand jury of a Court of criminal jurisdiction in Ohio, and it is urged that this may be received as *prima facie* evidence of criminality under the treaty and statute, because our Act respecting the duties of Justices in relation to indictable offences, 32 & 33 Vic. ch. 30, provides (secs. 4 and 5) that in case an indictment be found by the grand jury in any Court of criminal jurisdiction against any person at large, and in case such person has not appeared and pleaded to such indictment, the person who acts as clerk of the Crown or chief clerk of such Court, shall at any time at the end of the term or sittings at which the indictment was found, grant to the

prosecutor a certificate of such indictment having been found, on production of which the justice shall issue his warrant to apprehend such person, and upon proof of the identity of the person apprehended with the person mentioned in the indictment, the justice, without further inquiry, shall commit for trial or admit to bail.

The statute gives a form of the certificate : Form F.

What is produced before me is a copy, purporting to be a copy of an indictment for uttering a forged instrument, not certified as the statute requires, but endorsed, "Filed, J. M. Maitland, clerk, by Obed. Horn, deputy clerk," and to which is attached what is called a *capias*, directed to the sheriff of the county of Champaign, ordering him to arrest L. C. Hovey, to answer to an indictment exhibited against him for forgery.

Another instrument, purporting to be the original indictment for uttering is also produced, endorsed in the same manner as the copy just referred to, and to this is annexed a similar *capias*, or Bench warrant, to arrest the prisoner on an indictment for uttering, &c.

Looking at the language of the treaty and of our statute, I am of opinion that the evidence of criminality required must be such as to enable the Court or Judge to review it on a motion like the present, or the Governor-General before he acts on the warrant and determines whether the prisoner shall be delivered up under the treaty. If the fact of an indictment having been found is to be treated as sufficient evidence of criminality, for the purpose of the treaty, the grand jury of the foreign State are practically made the arbiters, instead of the tribunals of our own country ; and if the indictment describes an offence which comes within the treaty, extradition must follow, no matter what the evidence upon which it has been found.

What is required, in my opinion, is such evidence of the truth of the charge as would justify the apprehension and committal for trial of the person accused, if the crime had been committed in this Province. When a Justice of the

Peace issues his warrant under secs. 4 and 5 of the Indictable Offences Act, for the apprehension of a person against whom an indictment has been found, he is not acting on evidence of the truth of the charge, but merely on the fact that an indictment has been found. His warrant and commitment stand in lieu of a Bench warrant.

I think that I cannot look at the indictment as supplying the missing link in the evidence on this charge.

In a useful note to the case of *Re Counhaye*, L. R. 8 Q. B. 410, in Vol. VI. of a collection of cases from the English Law Reports, edited by Mr. N. C. Moak, many authorities are collected, and the practice and procedure in extradition matters pointed out. The editor observes, p. 142: "That a certified copy of an indictment found is not of the slightest value, and would be worthless in Canada. The Canadian statute recognizes only a complaint on examination thereunder, and a warrant issued on such complaint and depositions."

The result is, that the prisoner is remanded upon the warrant for forgery only.

CANADIAN BANK OF COMMERCE V. TASKER.

Interpleader—Costs.

A sheriff having made a seizure of goods under a writ of execution, which seizure the execution creditor had not specially directed, and a claimant to the goods having appeared, the execution creditor refused to allow the sheriff to withdraw. On the return of an interpleader summons obtained by the sheriff, the execution creditor abandoned his claim: *Held*, that the execution creditor might abandon at that stage of the proceedings without costs, and no order was made as to the costs of the sheriff.

[July 25, 1880.—*Osler, J.*]

This was an application for an interpleader order for the sheriff of Simcoe. The sheriff had seized certain goods

under writs of execution; but it did not appear that the execution creditor had specially instructed him to make the seizure. After the seizure was made, however, the execution creditor refused to allow the sheriff to withdraw, although a claimant to the goods had appeared.

Holman, for the claimant, filed an affidavit, proving the claim.

Aylesworth, for the execution creditor, on the affidavit being read, abandoned all claim to the goods seized under the writs, and contended that under the practice he was entitled to do so, without costs, the principle being, that an execution creditor was not called upon to decide what course he would take upon a mere notice of a claim to goods seized being given to the sheriff, but was entitled to wait and see whether the claim would be sworn to on affidavit, before electing whether he would abandon the seizure or try an issue with the claimant. He cited *Wilson v. Peatman*, 7 P. R. 84.

E. R. C. Proctor (W. Mulock) appeared for the sheriff.

OSLER, J., held that the practice entitled the execution creditor, where he had not specially directed the seizure, to abandon at this stage without paying to the claimant any costs, and he declined to make any order as to the sheriff's costs.

Order made barring the claim of the execution creditor, without costs.

HENDERSON V. HALL.

Alien defendant out of jurisdiction—Service—Irregularity—Amendment.

A copy of the writ of summons, instead of a notice thereof, had been served upon a defendant, not a British subject, outside of Ontario : Held, that this was an irregularity which could not be amended, and that the copy and service of the writ should be set aside.

[August 26, 1880.—Cameron, J.]

This was an action against a defendant residing out of Ontario, and not a British subject, upon whom a copy of the writ of summons itself had been served, instead of the notice of the writ required by section 50 of the Common Law Procedure Act, R. S. O. ch. 50.

Aylesworth moved to set aside the copy and service of the writ for irregularity.

Holman shewed cause, contending that service of the copy of the writ was most effectual notice of its contents, which was all the statute required, and urging that if his Lordship should be of a different opinion it was a case for amendment under the ample powers given by the Administration of Justice Act, or sections 54–56 of the Common Law Procedure Act.

CAMERON, J., held that no powers of amendment were given such as would enable service in one method to be substituted for service in another method, especially where the express language of the statute directed that the writ should not be served, but that a notice thereof should be. The copy and service of the writ were, therefore, set aside, with costs.

WATSON ET AL. v. McDONALD.

Commission—Viva voce examination.

Where a commission was issued to England to take evidence in a case involving many intricate questions of fact, the evidence was ordered to be taken on *viva voce* questions, instead of upon interrogatories.

[September 13, 1880.—*Osler, J.*]

Aylesworth moved absolute a summons for a commission to examine the plaintiffs as witnesses on their own behalf in Liverpool, England, and asked that the examination might be entirely upon *viva voce* questions. He referred to the affidavits filed to show that from the nature of the action, it being for a breach of a contract to ship cheese, and involving many intricate questions of fact as to fluctuations in markets, the quality and condition of the goods in question, &c., it would be extremely difficult and inevitably much less satisfactory to attempt taking the evidence upon written interrogatories and cross interrogatories. He urged also that there need in this case be no fear of danger arising from the course proposed, as the commission was to be executed in England, where the rules of evidence and practice of the Courts were the same as in Ontario.

Ogden, contra, refused to consent to the proposition to take the evidence upon *viva voce* questions, and insisted that, unless upon consent, there was no authority to make the order for anything but an examination upon written interrogatories where the commission was to be executed out of Canada, and that the practice on the point was perfectly well settled.

OSLER, J., made the order for the examination upon *viva voce* questions, remarking that he had before made orders to be executed out of the jurisdiction in the same way; that such a course, where safe, was much more satisfactory; and that he was not aware that any such inflexible practice as that contended for in opposition to the application, existed here.

THE METROPOLITAN LOAN AND SAVINGS COMPANY V.
MARA ET UX.

Married woman—Commitment of, under R. S. O. ch. 50—Liability to arrest.

A married woman, a judgment debtor, who refuses to attend and be examined as to her estate and effects, or refuses to disclose her property, or to give satisfactory answers to questions under R. S. O. ch. 50, secs. 304, 305, may be committed for disobedience of the statute, notwithstanding the R. S. O. ch. 67, sec. 3.

The order for commitment in such case is not *mesne* or *final* process, but punishment for disobedience of the statute.

Quære, as to the liability of a married woman to arrest.

[October 26, 1880.—Wilson, C.J.]

A summons was granted by Cameron, J., calling on the defendant, Elizabeth Mara, to shew cause why she should not be committed to the common gaol of the county of Carleton, or of such other county as she might reside or be found within, for contempt of Court, in that she upon the examination held upon the 19th of June last, refused to disclose her property; and did not make satisfactory answers respecting the same; and that she had concealed or made away with her property in order to defeat or defraud her creditors, or some one or more of them; or that such other order might be made as to the presiding Judge might seem proper.

The defendant Elizabeth Mara was examined twice as a judgment debtor; the first time on the 12th of November, 1879; the second time on the 23rd of June, 1880. The last examination is the only one necessary to refer to.

The examinant said: "Since the said [the first] examination, I have received money from William O'Meara—received it about the 5th of June, 1875. I have made use of about \$620 in paying debts—\$75 for one debt—\$50 for my own use; \$400 I paid my sister and \$95 I paid for my husband."

She stated to whom she paid these sums, and what the debts were for; and she said they were just debts. "I don't consider the debt due the plaintiffs as just as these I

have paid, because I did not incur the debt myself. The balance of the money I have now in my pocket in bills. I have had it there about four days. * * * No one told me to take the money out of the bank. I had no particular reason for so doing. No one suggested to me to take the money out of the bank. I wanted to use it at some future time. I have the money at home in my own possession; my husband cannot get at it. * * * I owe no other debts. * * * I gave up to Mr. O'Meara all my claim on my father's estate for the \$1,875. * * * No other debts are owing me." The furniture she said was mortgaged for \$200; it was due, and she still owed it. "I have money in my possession with which to discharge the judgment in this suit. I will pay over the money to the plaintiffs if I ever get the house at a reasonable figure, otherwise I will keep the money to support myself. I mean if the plaintiffs give me the house at a figure I can pay. I will not pay over the \$1,200 in my possession to the plaintiffs in this suit, unless I get the house at a reasonable figure. This judgment was got against me by my signing the mortgage. My husband, I believe, bought the house and lot in my name. He paid \$500 at the time he bought it. He tried to pay the balance by raising a mortgage on the property for \$1,000 from the plaintiffs. Upon this mortgage, judgment was got by the plaintiffs against the two of us. I think about five payments—about \$200—have been paid on account since the mortgage was given. I think the plaintiffs now claim about \$1,900 for principal, fines, and interest. This transaction was entirely my husband's. The property is worth now about \$700 or \$800. If the plaintiffs will give me the property for \$700 or \$800 and let me out of the judgment, I will give them that amount out of the money in my possession. I have no other means but the money now in my possession. I will sign over my good will of the property to the plaintiffs if they want it. I offered to become their tenant at the same rent the other people in the same tenement were paying. This offer was made to Mr. Cunningham to my

knowledge. My husband is only a temporary clerk in the Civil Service, liable to be discharged at any moment. I expect he will be discharged. I am, therefore, more careful of the money I have. * * * I don't know why my husband bought the house in my name. I made no objection. The \$500 paid was my husband's. The purchase was made I think in 1874. We have been living in it ever since. We have not paid any rent to the plaintiffs. We have made five payments of \$43 to them; we have put in the water, and put on a new roof. When I say I offered to go in as tenant, I mean my husband offered, and I am speaking from hearsay. I am aware there was an action of ejectment commenced. I don't know why it was defended. It was commenced in April or May. As far as I am concerned, I am willing to withdraw the defence to the ejectment action."

Aylesworth shewed cause and cited *Boswell v. Pomeroy*, 2 P. R. 310; *Lemon v. Lemon*, 6 P. R. 184; *McInnis v. Hardy*, 2 U. C. L. J. 295; *Wallis v. Harper*, 7 U. C. L. J. 72; *Hobbs v. Scott*, 23 U. C. R. 619; *McGregor v. Scarlett*, 7 P. R. 20.

Caswell supported the summons, and referred to the cases of *Dillon v. Cunningham*, L. R. 8 Ex. 23; *Bullen v. Moodie*, 13 C. P. 126; *Perrin v. Bowes*, 2 P. R. 348; R. S. O., ch. 50, sec. 305, and ch. 67, sec. 3.

WILSON, C. J.—It appears from the examination that the defendant Elizabeth Mara had about \$1,200 of money in her possession, which she refuses to give up. She offers to give \$800 of it in return for the property mortgaged.

She also offers to sign over her good will, as she calls it, to the property to the plaintiffs, if they want it. That is, as I understand her, she will give up all her interest in the mortgaged property, of which, subject to the mortgage, she has the legal title. That is, she will release her equity of redemption, upon getting a discharge from the plaintiffs' claim. But she says she will not pay over the

\$800, part of the \$1,200 in her possession to the plaintiffs, unless they give her the property for the \$800.

It appears her husband bought the property and paid \$500 upon it, taking the title in his wife's name ; and then the two by mortgage borrowed \$1,000 upon it from the plaintiffs, upon which they have paid \$215. I should be glad if the plaintiffs would take the \$800 offered by the wife for the property, and discharge it and her from further liability, and look only to the husband for the residue of their claim ; but there is something to be considered against that. It was the husband's money which bought the property in part, and the money of the plaintiffs lent to the husband and wife which completed the purchase ; and in that view, the wife has no special equity or claim to the property.

I have, however, only to deal with the legal rights and responsibilities of the parties. In my opinion the examination shews the wife has concealed or made away with her property in order to defeat or defraud the plaintiffs.

She had the money in the bank where it could have been seized by the sheriff. She drew it out, she says, not at the suggestion or direction of any one ; and she had no particular reason, she says, in drawing it out.

It appears to me she did so to prevent it being taken by the sheriff. She said in her examination she had the money then in her pocket ; and again, she said she had it at home where her husband could not get it. If it were on her person the sheriff, I presume, could not take it. If it were at her house and her husband could not get it, it is very likely the sheriff could not get at it either ; and she plainly declared she would not give it up ; but at the most only a part of it, and that upon certain conditions.

I need not consider the liability of a married woman to be arrested at the common law, because by our Statute, R. S. O. ch. 67, sec. 3, it is enacted, "No married woman shall be liable to arrest either on mesne or final process ;" and that privilege is given, although the woman has sufficient property to pay the debt. That enactment does not,

I think, prevent the Court or a Judge from enforcing the provisions of R. S. O. ch. 50, sec. 304-305, against a married woman who will not attend to be examined touching her estate and effects; or attending, who refuses to disclose her property, or does not give satisfactory answers, or who has concealed or made away with her property to defeat or defraud her creditors. The statute is general in its terms, and it would be useless to examine or to attempt to examine a married woman as to her property, if there were no penalty or sanction to enforce her obedience to it.

It is the Court or Judge who orders the commitment under that statute. The order of commitment is not in any sense either *mesne* or *final* process. It is not, apparently, ordered for non-payment of a debt, but for the disobedience of the statute, and without which power the statute as to married women would be a dead letter. *Kehoe v. Brown*, 13 C. P. 549, may be referred to.

In *Ex parte Dakins*, 16 C. B. 77, it was decided that imprisonment imposed under the Debtors' Act of 1869, before referred to, which is worded very similarly to our statute, was *in the nature of an execution*, but there the statute directs the party shall be discharged before the time of imprisonment expires *on payment of the debt*. In our Act there is no such provision, as is pointed out in *Henderson v. Dickson*, 19 U. C. R. 592, where it was held the imprisonment under the Act was for contempt, and not by way of execution. I am of opinion, therefore, a married woman may be ordered to be committed for her disobedience of the statute.

The non-arrest of a married woman may have to be considered also in connection with those enactments which relate to the property of a married woman and to her contracts and debts, and to her liability in respect of such property contracts and debts, by which it is declared she shall be considered "as if she were a *feme sole*." In this case the woman owned the land, and with the aid of her husband raised money upon it—that is, upon her own real estate; and it may, therefore, reasonably be contended that

she should in such a case be treated as a *feme sole*; but I do not decide this application upon that ground. If I were to order a *ca. sa.* to be issued, that would require a decision upon that point directly to be come to. I should have to say whether the provision against arrest should qualify the enactment that the married woman should in such a case be treated as a *feme sole*, or whether the latter enactment did not qualify or control the former. The land certainly is liable for her husband's debts, because she received it from her husband, and she was married between 1859 and 1872: R. S. O. ch. 125, sec. 3; but this debt seems rather to be her own, as it was incurred to be applied upon her own property.

I am unwilling, however, to make an order against her without affording a further opportunity to see if some arrangement cannot be made between the parties. The woman should in no event be deprived of all her money. She cannot be left penniless, for it does not appear her husband is able to do much for her or for himself either. But she can have no excuse for keeping back the whole sum of \$1,200, which she admits she has in her possession, from the plaintiffs, who lent it to her and her husband.

I shall allow a fortnight for a further negociation, and when I know the result of it I shall, if I am obliged to do so, know what order to make. But I hope I shall not be required to make an order in the case.

IN RE FLINT AND JELLETT, ATTORNEYS.

Attorney—Costs—Mortgage.

L., being the holder of a mortgage upon which an instalment of interest was due, instructed his attorneys "to take legal proceedings on the securities unless the interest was paid on the 12th April." The mortgagor called on the 12th April, and told the attorneys that he intended to pay off the mortgage shortly, and hoped no costs would be incurred. On the 15th April the attorneys issued a writ of ejectment, and prepared notice of sale, and served them on the mortgagor on 23rd April, when he called to pay off the mortgage. They also refused to take the principal money.

Held, that the attorneys had no authority to collect the principal, and that they were entitled to the costs of the ejectment suit, but to no other costs whatever.

[October 29, 1880.—*Wilson, C.J.*]

One Lowry was the holder of a mortgage for \$1,200, bearing interest at nine per cent. per annum, payable half yearly on the 14th days of February and August. The instalment of \$54 interest which fell due on the 14th February, 1880, being unpaid, Messrs. Flint and Jellett, the attorneys for the mortgagee, wrote a letter to Ashley the mortgagor, on the 5th April, 1880, notifying him to pay the arrears. Ashley called on the 12th April and told one of the attorneys that he would shortly pay off all the mortgage, as he was about to sell his land, and hoped that no costs would be incurred. His affidavit stated that he left with the impression that no proceedings would be taken. On the 15th April, the attorneys prepared notice of sale, and on the following day issued a writ of ejectment. Nothing was done until the 23rd April, when Ashley called with the principal and interest. The attorneys then refused to receive anything but the interest; and while he was in their office served him with notice, writ, and bill of costs, amounting to \$32. Lowry's affidavit stated that he left the mortgage with the attorneys for collection as the same might become due: that the interest due in February, 1880, not being paid, he on the 5th April, directed the attorneys' clerk to write to Ashley that if it were not paid without delay costs would be incurred: that on the 10th of April he enquired of the attorneys if the interest had been paid, and he was told it

had not. On this he gave instructions to them *to take legal proceedings on the securities unless the interest was paid on the 12th April.* R. W. Shanks, the accountant of the attorneys, stated that Lowry told him on the 10th of April, "That if the parties did not by the 12th come in, we should proceed to collect *the over due amount on the securities* in our hands."

Morgan Jellett stated that on the 12th of April, he was told by Lowry that he had given the attorneys' book-keeper instructions to take proceedings for the collection of *certain interest due* on a mortgage made by Ashley, and as the interest was not paid the legal proceedings were taken.

Upon the application of Ashley, Mr. Dalton made an order referring it to the Master of the Common Pleas to ascertain the amount of costs taxable and to report thereon, reserving further directions. The Master having taxed the bill and made his report, the case came up to be heard on further directions before Wilson, C. J.

Aylesworth, appeared for Ashley the mortgagor.
Crickmore, for the attorneys.

WILSON, C. J.—Upon the facts I am of opinion with the Master that there was no authority given to the attorneys to call in the principal money. Their client would not accept it, and the instructions were to proceed for the interest only, being \$54.

I cannot say the attorneys were precluded by their client's instructions, "to take legal proceedings on the securities in their hands, unless the interest was paid by the 12th of April," from bringing an action of ejectment, although it may have been an unnecessary proceeding.

And I cannot say the attorneys ever promised or led the defendant to believe they would not take any proceedings against him without notice to him, after he was at their office on the 12th of April. I am disposed, therefore, to allow to the attorneys the costs of the ejectment suit, but no other costs whatever, and I shall modify the report of Master to that extent, without the costs of this application.

PATTULLO ET AL V. CHURCH.

Attorney and client—Costs—Taxation—Delay—Special circumstances.

Where a client applies for taxation of an attorney's bill after the expiration of a year from its delivery, he should shew such special circumstances as would have justified a reasonable man in not previously seeking a taxation, or that he was prevented by some unavoidable cause.

Where judgment had been signed against the client in an action on the bill during the pendency of negotiations for a settlement, this was held a sufficient reason for directing a taxation after the year.

[November 6, 1880.—*Cameron, J.*]

This was an application by way of appeal from an order made in Chambers by the Clerk of the Crown and Pleas in the Queen's Bench, directing that the bill of costs of the plaintiffs' should be referred to the Master to be taxed. This order was made not on a summons to refer the bill to taxation, but on a summons to shew cause why the judgment signed on a specially endorsed writ by the plaintiffs for default of an appearance should not be set aside, and defendant be allowed to appear and plead, on the grounds, as disclosed in affidavits and papers filed, that after the service of the writ of summons, which service was made about the fifteenth of October, 1879, and before the time for appearing had expired, the defendant called at the plaintiffs' office, with a view of settling the claim, and by reason of both plaintiffs not being present a final settlement could not then be had, but defendant gave his note for \$200 at three months on account, and the plaintiff Scott then agreed in writing to stay proceedings till the twenty-second day of October, in order that a settlement in the mean time might be arrived at: that the defendant did call at the office of the plaintiffs before the 22nd of October, but owing to the absence of one of the plaintiffs, the settlement was again postponed: that the defendant had made frequent attempts to effect a settlement, but was not able to get the plaintiffs together: that things continued in this way up to the time he received a letter from the

plaintiffs about the 8th October, 1880, informing him that the balance of the judgment had not been paid, and unless it was settled by the next Wednesday execution would be placed in the sheriff's hands: that defendant thereupon called on plaintiffs, and expressed surprise that judgment had been signed, and especially that it had been signed for the amount it had, when plaintiffs informed him they had not signed judgment till long after the writ was served—it was in fact signed on the 24th day of March, 1880: that the defendant was not indebted to the plaintiffs in the amount for which judgment had been entered, or to any such extent whatever, and that at the time of issuing the summons he was not indebted to the plaintiffs in anything like the amount they claimed, and that he would have caused their bill to be taxed, and the suit defended, had they not held out to him the inducement of an amicable settlement.

On the argument of the summons after several enlargements, the Clerk of the Crown gave leave to the defendant to bring before him the plaintiffs' bill of costs, and on view thereof directed the above reference.

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Aylesworth, for the plaintiffs, supported the summons in appeal.

Clement, shewed cause.

CAMERON, J.—It was urged before me on the appeal, that the original material was insufficient to warrant the setting aside of the judgment, and it was too late to have the bills taxed, more than a year having elapsed from the time the bill of costs was served before the application, and there were no special circumstances in the case on which a discretion in favour of taxation could be exercised. Moreover, judgment having been signed, it stood in the place of a verdict, or the execution of a writ of enquiry, and sec. 35 of R. S. O. ch. 140, prohibited a reference under the circumstances of the case.

Had the application been made to me in the first instance to set aside the judgment or refer the bill, I might, governed

by the authorities on the material produced, have declined to interfere; but the learned Clerk of the Crown and Pleas, has in the exercise of his discretion thought the ends of justice would be better served by a taxation of the plaintiffs' bill, and unless it appears he is clearly wrong, or has acted upon some erroneous principle, I ought not to overrule his decision.

The only point on which he may have erred is in directing a reference after the expiration of a year from the delivery of the bill, and after the signing of judgment. This depends entirely upon the question, whether the case presents such special circumstances as would warrant the setting aside the direction of the statute, that no reference shall be directed after the lapse of a year, or after verdict or the execution of a writ or enquiry. The statute furnishes no guide to the character of the circumstances that will justify a reference, but they should be such as would justify a reasonable man in delaying to seek a taxation, if not prevented by some unavoidable cause or misadventure. The ground upon which the learned Clerk of the Crown acted, is not stated, but I may conjecture that it is to be found in the fact that the defendant honestly desired to have an amicable settlement, and this was prevented by the plaintiffs not being in a position by reason of the absence of one of them, when he called pursuant to arrangement to make a settlement; and no intimation was given to him by the plaintiffs, directly, till after the year had elapsed, that judgment had been signed, and would be enforced. The bill of costs is dated in April, 1879; the judgment was signed on the 24th of March, 1880, and no direct intimation of its having been signed was given until October, 1880; although he may have been informed indirectly that a judgment had been entered against him, the defendant may very well under the circumstances have been led to believe that the prospect of a settlement was not at an end, and the plaintiffs ought, I think, to have given an intimation of their intention to sign judgment and proceed, in order that he might be in the

position he was at the time he called during the stay of proceedings. They ought in fact before signing the judgment, to have given him the notice they gave seven months afterwards, and while they were not legally bound to do so, so as to make the judgment a judgment signed clearly contrary to good faith; on this ground, the negotiations that admittedly had been going on, furnish the special circumstances required by the statute to authorize the learned Clerk of the Crown to direct the reference after the lapse of the year, and the signing of judgment.

The learned Clerk of the Crown is much more familiar with the question of costs than I am, and having on view of the bill, thought it just to order a reference, I should be reluctant to interfere with his discretion, and set my judgment in this respect against his. I think, therefore, this summons should be discharged, but without costs, as the defendant does not appear to have been ingenuous in framing his affidavits, as he certainly did not present all the facts in his original application as they should have appeared, and this has probably invited an appeal.

IN RE EVANS V. SUTTON ET AL.

Division Court—Prohibition—Jurisdiction—Proof of claim.

The plaintiff, residing within the limits of the Ninth Division Court of Wentworth, sued in that Court two defendants, who both resided in St. Catharines, on a cause of action which partly arose in St. Catharines. One defendant put in a notice of defence disputing the claim and the jurisdiction of the Court. At the trial neither defendant appeared, and the Division Court Judge gave judgment for the plaintiff without requiring any proof of the claim, in accordance, it was said, with the practice in that county.

Held, that proof of the claim should have been given, and a prohibition was ordered, with costs.

Held, also, that an application for a new trial by the defendant who had given the notice, was no waiver of his right to object to the jurisdiction; and that the other defendant could not prejudice such right by having given no notice of defence.

[November 12, 1880.—*Cameron, J.*]

The defendant William G. Sutton on the 26th of October 1880, obtained from Mr. Justice Galt, in Chambers, a summons calling on the plaintiff to shew cause why a writ of prohibition should not issue, to prohibit the Judge of the Ninth Division Court of the County of Wentworth from further proceeding in the plaint in the said Court, on the ground that the said Court had no jurisdiction to hear or determine the matter of the said plaint. After several enlargements, the summons was moved absolute—and cause shewn thereto on the 9th of November.

From the affidavits and papers filed, it appeared the plaintiff's claim amounted to \$72.90 for goods sold and delivered: that the defendants both resided at the City of St. Catharines, in the County of Lincoln: that some of the goods were sold and delivered in St. Catharines, and others of them were ordered by letter written by the defendant John A. Sutton at St. Catharines: that the defendant William G. Sutton, gave notice to the Division Court Clerk of the said Ninth Division Court that the Court had no jurisdiction to try the case, and that he disputed the plaintiff's claim. The defendant, John A. Sutton gave no notice of defence. The plaintiff's notice of claim described the defendants as of St. Catharines. The notice disputing the claim and jurisdiction of the Court was received by the

Clerk of the Court in due time. The defendant William G. Sutton did not appear at the trial, and judgment was given against both defendants as by default, and no attention whatever was paid to the notice disputing the claim and jurisdiction ; it being the practice adopted by the Judges of the County Court holding the Division Courts in the County of Wenthworth, to give judgment against a defendant for the amount claimed, without requiring any proof of the claim.

In due time an application was made for a new trial to the Judge of the County Court, both on the ground of want of jurisdiction in the Court and on the merits. The learned Judge reported that the plaintiff consented to a new trial being allowed on the merits, and time was given to the defendant's agent to consult the defendant, William G. Sutton, as to whether he would accept a new trial on the merits —that is, as I understand, without raising the question of jurisdiction. To this the defendant did not accede, and the learned Judge conceiving that prohibition was the proper remedy, if any, refused the new trial.

Gordon shewed cause, and contended that the defendant John A. Sutton, having allowed judgment to pass against him by default, he was estopped by virtue of section 14 of the Division Courts Act, 1880, from afterwards disputing the jurisdiction, and by section 62 of R. S. O., chap. 47, a suit cognizable in a Division Court may be entered where the cause of action arose or where the defendants or any one of them resides or carries on business—it must be assumed that he resided within the jurisdiction of the Court—and the other defendant, although he had given notice disputing the jurisdiction, was in no better position. He also contended the affidavit of the defendant did not sufficiently show that the whole cause of action did not arise within the jurisdiction of the Court, and if any part was within the jurisdiction he was not entitled to prohibition ; that, at all events, the defendant by moving for a new trial had waived his objection to the jurisdiction, as such an application admitted jurisdiction,

Aylesworth supported the summons, contending that if any part of the claim was beyond the jurisdiction of the Court the suit could not be proceeded with in that Court at all: that nothing done or omitted by the other defendant could affect his client: that applying for a new trial was not a waiver of the objection to jurisdiction, the motion having been made on the express ground of want of jurisdiction, as well as on the merits; and the practice in that Division Court, as reported by the learned Judge, of giving judgment by reason of the defendant not appearing, although he had given notice disputing the claim, was an improper practice, not sanctioned by the Division Court Acts or any other law.

CAMERON, J.—I think the defendant William G. Sutton is entitled to the writ of prohibition asked for by his summons. It appears on the affidavits that the defendants were both residents in the county of Lincoln, out of the jurisdiction of the Ninth Division Court of the county of Wentworth, and also that the cause of action arose at St. Catharines, in the first-named county, although it is not stated as clearly as it might have been that the whole cause of action so arose. It is not denied by the plaintiff that it did so arise, and in the absence of such denial it may well be the defendant intended, by the language used in his affidavit, as follows: "that a part of the goods were sold in St. Catharines, and the contract for the same was made in the said city; the item of goods amounting to the sum of fifty dollars and fifty-seven cents was contracted in the City of St. Catharines, and a portion of the other items were ordered by letters written at St. Catharines," to assert the whole cause of action arose in St. Catharines. This may mean part of the goods was sold in St. Catharines, and the other part was ordered by letters written there, though it is also open to this construction, that part of the goods were sold in St. Catharines, viz., the item for fifty dollars and fifty-seven cents, and part of the other items were ordered by letter, leaving some of the items unaccounted for, and not showing where the cause of action

as to them arose. If this were of any importance the plaintiff might have shewn the true facts with reference to them.

But assuming that part of the cause of action did arise within the jurisdiction of the Court, the authorities cited by Mr. Aylesworth, *in re Hagel*, 8 P. R. 183; *Noxon v. Holmes*, 24 C. P. 541; and *Watt v. Van Every*, 23 U. C. R. 196; show that to give jurisdiction to a Division Court in a division wherein the defendant does not reside, the whole cause of action must have arisen in such division.

I was much surprised to learn from the report of the learned Judge that the practice prevails in the county of Wentworth, of giving judgment for the plaintiff, for the amount claimed in cases where the defendant has given notice disputing the claim of the plaintiff, by reason of the defendant not appearing at the trial, without any proof of the claim. I cannot see on what the practice is based. Section 82 of R. S. O. ch. 47, shows what the Judge may do in such a case, and it is:—"The Judge, on proof of due service of the summons, and copy of the plaintiff's account, claim, or demand, may proceed to the *hearing or trial of the cause on the part of the plaintiff only*, and the order, verdict, or judgment thereupon shall be final and absolute, and as valid as if both parties had attended." Surely a hearing or trial does not mean entering a verdict or judgment without evidence for the plaintiff. Had the learned Judge himself not reported that the practice prevailed, I should have scarcely deemed it possible upon less convincing evidence that it could exist, as it seems to me contrary to natural justice. The defendant, by giving notice that he disputes the claim, puts the plaintiff on his guard, and requires him to furnish proof which shall be to the satisfaction of the Judge, that his claim is just. The defendant may not wish to incur the expense of appearing to defend, relying on the fact that the plaintiff will require to prove his demand, and that the Judge will see it is properly proved, and I see no reason why in a Superior Court the plaintiff should be required to prove his claim when the defendant disputes it by plea,

and not in an inferior Court, where his demand is disputed in the manner pointed out by the Act creating such inferior Court. The language of the learned Judge leaves no doubt as to the practice. It is as follows :—"In these Courts (the higher Courts) of course a plea disputing plaintiff's right to recover casts upon him the onus of making out a case, but in the Division Courts the practice is that a notice disputing the plaintiff's claim has no effect beyond delaying the recovery of judgment, unless the defendant appears at the hearing to sustain his defence."

The objection that the defendant John A. Sutton allowed judgment to go against him and did not give notice disputing the jurisdiction of the Court, estops the other defendant from relying on his notice of want of jurisdiction, is not of any weight. His omission cannot be allowed to prejudice his co-defendant, who disputes his liability altogether. The objection that the defendant, W. G. Sutton, by applying for a new trial waived his right to object to the jurisdiction, is also untenable. The defendant certainly did not, by setting up the want of jurisdiction, waive that objection, and he had a right to relieve himself from what he deemed an unjust judgment by the easiest and most direct and inexpensive means that presented themselves; and the learned Judge of the Division Court might have granted the new trial and taken evidence as to where the cause of action arose, and if satisfied it was not within the jurisdiction, he might have transferred it to the proper Court; but that power does not rest with a Judge in Chambers. I have no alternative but to order the writ of prohibition to issue, and with costs to be paid by the plaintiff.

MULLIN V. PASCOE.

Married woman—Surety.

Held, in an interpleader suit, that a married woman was not a proper surety, and time was given to substitute another surety for her.

[November 20, 1880.—Mr. Dalton, Q. C.]

W. M. Hall obtained a summons to extend the time for giving security on the part of the claimant with regard to an interpleader order made in this cause, on affidavit explaining why the security had not been given within the time required, and that the bond was already filed in the Queen's Bench office.

Holman shewed cause, and objected that in the bond filed one of the sureties named was a married woman, and under the present state of the Married Woman's Property Law, she was an objectionable surety.

MR. DALTON held that a married woman was not a proper surety, and directed that a new surety should be substituted for her, and extended the time for so doing.

RE CRONYN, KEW, AND BETTS, ATTORNEYS.

Costs—Mortgage—Subsequent encumbrancer—Taxation.

First mortgagees sold under power of sale, and paid their attorneys' costs. A second mortgagee was held not to be entitled to the right of taxing these costs.

Re Macdonald, Macdonald & Marsh, supra, p. 88, approved.

[November 30, 1880.—Queen's Bench, full Court.]

J. A. Macdonnell obtained a summons on the part of Thomas Ouellette, calling upon Messrs. Cronyn, Kew, and Betts, to shew cause why their bill of costs, incurred in exercising a power of sale in a certain mortgage from Jane Fortier to the Huron and Erie Loan and Savings Company, should not be referred to the Master to be taxed.

It appeared that on the 8th of May, 1876, Jane Fortier mortgaged certain lands to the Huron and Erie Loan and Savings Company, and subsequently made a second mortgage, which was afterwards assigned to Thomas Ouellette, the applicant. Default having been made in payment of the mortgage to the Company, the property was sold under the power of sale, on the 31st of December, 1878, when Thomas Ouellette, the applicant, became the purchaser, and paid over to the said attorneys, as attorneys for the said Company, the full amount of his purchase money, \$1700.

The Company applied the purchase money to the payment of their debt, and the costs of their attorneys, and held a small balance in their hands, which they were willing to pay over to the applicant as a subsequent incumbrancer.

It was objected on the part of the attorneys that no taxation should be had, for the reason that they had been paid by their clients the Loan Company, and that their bill of costs had been finally settled between themselves and their client; and that no right existed on the part of the applicant to tax their bills; and if any remedy existed, it must be as against the Loan Company.

On return of the summons, Mr. Dalton enlarged it to be argued before the full Court of Queen's Bench, in Michaelmas Term.

Holman shewed cause. He cited *Marshall on Costs*, 219; *Re Neale*, 10 Beav. 181; *Re Harper*, 10 Beav. 284; *Re Pugh*, 11 W. R. 762; *Re Barnard*, 2 De G. M. & G. 365; *Re Strother*, 3 Kay. & J. 58; *Re Dickson*, 8 De G. M. & G. 660; *Re Baker*, 32 Beav. 526; *Re Massey*, 34 Beav. 463; *Read v. Cotton*, 6 U. C. L. J. 114; *Re McDonald, McDonald, & Marsh*, 8 P. R. 88.

J. A. MacDonnell, in support of summons.

At the close of the argument, the Court expressed its approval of the decision in *Re McDonald, McDonald, & Marsh*, 8 P. R. 88; and held that the applicant had no right to have the bills of the attorneys referred to taxation, and discharged the summons, without costs.

IN RE MEAD V. CREARY, THE DOMINION SAVINGS AND INVESTMENT SOCIETY, GARNISHEES.*Division Court—Garnishment—Prohibition—Jurisdiction.*

The garnishees held over \$500 belonging to the defendant. The plaintiff claimed the right to attach this money in a Division Court, to the extent of his judgment, amounting to \$72.25.

Held, that the jurisdiction of Division Courts in garnishee proceedings is limited to debts within the proper competence of such Courts to try, and a prohibition was therefore ordered.

Held, also, that under 43 Vic. ch. 8. O., secs. 10 and 14, notice of intention to dispute the jurisdiction of a Division Court is only necessary when the cause of action being within Division Court jurisdiction, the suit is brought in the wrong Court.

[January 21, 1881.—Cameron, J.]

ON the 18th December, 1880, a summons was obtained from Osler, J., in Chambers, on behalf of the Dominion Savings and Investment Society, calling on William Elliott, Judge of the County Court of the county of Middlesex, and Thomas Mead, plaintiff in the above suit in the First Division Court of the county of Middlesex, to shew cause “why a writ of prohibition should not issue to prohibit the said Judge from further proceedings in a plaint in the First Division Court of the county of Middlesex wherein Thomas Mead is primary creditor, and J. C. Creary is defendant, and the Dominion Savings and Investment Society are garnishees, on grounds disclosed in affidavits and papers filed.”

The affidavits filed disclosed the following facts : That the garnishees sold certain land of the primary debtor, under and by virtue of a certain indenture of mortgage made under the Act respecting Short Forms of Mortgages, containing a power of sale : that the sum realized upon such sale was \$2,115 : that the amount due to the garnishees, as claimed by them at the time of the sale, was \$1,527.96 : that at the time of sale the Federal Bank held a judgment against the primary debtor, and executions against goods and lands upon such judgment were in the hands of the sheriff of the county of Lambton, in which county the mortgaged lands are situated : that the claim

of the Federal Bank was over \$500, and the mortgagees had paid \$500 to the said bank : that the claim of the primary creditor, for which judgment had been obtained, was \$72.25 : that the garnishees, as part of their claim against the primary debtor, claimed the sum of \$300 paid for insurance on the mortgaged property, the right to which the creditor and debtor both disputed : that at the hearing of the cause in the Division Court the jurisdiction of that Court to enquire into the matter was objected to on behalf of the garnishees : and that no final decision or judgment had been given as far as the garnishees were concerned, in the Division Court.

After enlargement, *Aylesworth*, on the 12th January, 1881, shewed cause, and filed affidavits, shewing that the suit in the Division Court was instituted under section 136 of the Division Courts Act, R.S.O. ch. 47, on the 28th of June, 1880, that the suit came on for trial at the sittings of the Court on the 24th September, 1880 : that at that Court the primary creditor, having previously obtained judgment against the primary debtor, proved that the garnishees had sold the land of the debtor for \$2,115, and that they had admitted there was a large sum in their hands to the credit of the debtor, and that they also in Court admitted there still remained in their hands upwards of \$500 : that the garnishees also then and there entered into their defence, and called as a witness John Cameron, attorney for the Federal Bank, who stated that the said bank had recovered judgment in the Court of Queen's Bench against the debtor for about \$1,000, and had then in the hands of the sheriff of the county of Lambton, in force upon the said judgment, an execution against the lands of the debtor ; but it was proved that part of the amount of the judgment had been made by the sheriff under execution against the debtor's goods, and that \$500 had been paid on account to the said attorney, who admitted the payment to him : that the said Cameron at said trial stated that he was still attorney for the bank, and that the bank did not

desire to intervene in this suit, and were not setting up any claim, and desired the Judge to note his disclaimer, and that he appeared merely as a witness for the garnishees: that after the giving of the testimony above mentioned the further hearing of the matter was adjourned at the request of the attorney for the garnishees, for their benefit, until a future time, to enable them to prove there was not sufficient money in their hands out of the proceeds of the sale, to satisfy the primary creditor's claim; and the said attorney, instead of objecting to the jurisdiction of the Court, appeared willing and anxious to have the matter there disposed of finally: that according to adjournment the matter came on for further hearing and determination on the 15th October, 1880, when the garnishees called further witnesses for the purpose of shewing there was not in their hands sufficient surplus to answer the creditor's claim, and it was not until after they had greatly failed in making out their case that any objection to the jurisdiction was taken: that the creditor had always maintained the garnishees had no right to object to the jurisdiction of the Court, and never consented to any proceedings being taken to test the jurisdiction, but pressed for judgment, leaving them to apply for prohibition if so advised: that the charge of \$300 paid for insurance, was not the only one which was incorrect, and the primary creditor's claim to have judgment did not depend upon that. The facts relating to such charge were: The garnishees had power under the mortgage to insure certain property to the amount of \$1,000, and they, without the consent of the mortgagor or any one interested in the property, insured for \$300, and seek to charge the whole amount of premiums against the debtor: that the creditor claimed \$300 instead of \$150: that if all the garnishees' claim were allowed, including therein the balance due on the judgment of the bank, there would still be a surplus sufficient to satisfy their claim: that at the time of the trial it was not alleged or pretended that the sum of \$500 had been paid by the garnishees to the bank, but it was alleged

that no portion of the claim of the bank had been paid by the primary debtor, except the sum of \$500 by the garnishees, until it was shewn by the sheriff of the county of Lambton that a portion of the judgment had been made under execution, and that there was reason to believe the payment of the sum by the garnishees had been made since the trial with full knowledge of the facts above set forth, and that no notice on the part of the garnishees or any other party or person of intention to contest the jurisdiction of the Court to hear or determine the cause and matter, was ever left with the Clerk of the Division Court or otherwise given.

Aylesworth contended that the garnishees not having given notice that they intended to contest the jurisdiction of the Division Court to hear or determine the matter, and left the same with the clerk of the Division Court, as required by sec. 14 of ch. 8, 43 Vict. O., they could not now be allowed to dispute such jurisdiction, as by the omission to give the notice, jurisdiction was by virtue of the clause conferred upon the Court, though the cause of claim might not originally have been within the jurisdiction ; that the objection in the present stage of the case was premature, as the Court might decide in the garnishees' favour on the question of jurisdiction, and if in any view of the claim the Court could have jurisdiction prohibition ought not to be granted ; that in garnishee proceedings there was no limit to the jurisdiction of the Court, as the enquiry would only extend to the amount of the original debt of the primary debtor ; that the Division Court had jurisdiction to enquire into matters of account to the amount of \$400, and it did not appear that the amount actually due to the primary debtor was in excess of that sum; and that if prohibition was ordered, which he contended it could not possibly be, there should be no costs to the garnishees.

Roaf supported the summons and filed affidavits in reply, shewing that the judgment of the Federal Bank was for \$1,006 debt and \$27.27 costs taxed ; that it was recovered on the 21st of August, 1879, and executions were issued on

the 1st of September, 1879, against the goods and lands of the defendant ; that on the 13th of September the manager of the bank at Strathroy recovered \$500 in part payment ; that the sheriff did realize out of the goods of the debtor some moneys, but they were applied on prior executions and sheriff's fees, and no part thereof was applied on the executions of the bank ; with the exception of the said sum of \$500 and the amount paid by the garnishees, no sum whatever had been paid on the judgment of the bank, and the whole balance remained due and unpaid ; that Cameron, when the case first came on before Judge Robinson, attended the Court for the purpose of intervening on behalf of the said bank, and had the sheriff there as a witness to produce the writ of *fieri facias* against lands : that the sheriff was called as a witness on behalf of the bank and examined, but as he was unable to shew with accuracy the application of the moneys made under the execution in his hands against the goods the Judge adjourned the suit till the next Court : that at that Court Cameron attended as a witness for the garnishees, and that it was true he told the Judge he only attended as a witness, but that it was incorrect that he did not wish to intervene on behalf of the bank, and at that Court Mr. Purdon objected for the garnishees to the jurisdiction of the Court : that the Judge, who appeared unwilling to go into the case, stated he considered it could be better understood in Chambers, and took the evidence of the witnesses then in Court at the request of Mr. Meredith in order to save the expense of another attendance, and ordered the matter to stand over to be heard in Chambers : that the evidence of other witnesses was taken in Chambers, and on Mr. Purdon again objecting to the jurisdiction, the Judge suggested that prohibition should be moved for, and Mr. Meredith said it would be better to move before judgment was given, and this was thought advisable by all parties ; that Cameron appeared on behalf on the bank, and intervened under the 136th section of the Division Court Act, and if he had the least doubt that the question of jurisdiction had been raised he would have raised it.

He contended that notice of intention to contest the jurisdiction was not necessary in a case like the present; that such notice was only necessary where it was intended to raise the question as to whether the particular Court had jurisdiction in a case within the jurisdiction of some Division Court, and not where no Division Court could have jurisdiction; that in garnishee cases as well as others where the debt or money due by the garnishee to the primary debtor was in excess of the amount over which the Court had jurisdiction, the Court was ousted of jurisdiction, and in a case as in this, where it appears there are other parties interested in the money claimed besides the primary debtor, the Court is also ousted of jurisdiction: that the claim in this case is not in respect of a debt but a trust, and is not a money demand within the jurisdiction of the Division Court: that the provision in the mortgage relating to the taking possession and sale of the mortgage premises created a clear trust, and was as follows: "It is hereby further agreed between the parties to these presents that until such sale or sales shall be made the said mortgagees * * shall and will stand and be possessed of and interested in the rents and profits of the said lands * * in case they shall take possession of the same on any default, as aforesaid, and after such sale shall stand and be possessed of and interested in the moneys to arise and be produced by such sale, or which shall be received by the mortgagees by reason of any insurance upon the premises or any part thereof, upon trust in the first place to pay and satisfy the costs and charges of preparing for and making sales, leases, and conveyances, and all other costs and charges, damages and expenses which the said mortgagees * * shall bear, sustain, or be put to for taxes, rent, insurances, and repairs, and all other costs and charges which may be incurred in and about the execution of any trusts in them hereby reposed; and in the next place to pay and satisfy the principal sum of money and interest hereby secured, or mentioned, or intended so to be, or so much thereof as shall remain due and unsatisfied up to and inclusive of the day

whereon the said principal sum shall be paid and satisfied ; and after full payment and satisfaction of all such sums of money and interest as aforesaid, upon *the further trust* that the said mortgagees do and shall pay the surplus to the said mortgagor."

CAMERON, J.—The contention of Mr. Roaf that notice disputing the jurisdiction is only required when a suit within the proper competence of the Division Court has been brought in the wrong Division Court, to enable a defendant or garnishee to dispute the jurisdiction, is well founded. I have been led to this conclusion by the following considerations : Division Courts are limited in their jurisdiction in three ways, first, certain causes of action they have no power to try at all, such as gambling debts, malicious prosecutions, libel, slander, &c.; secondly, they are limited by the amount of claim, whether in respect of a money demand or a wrong ; and thirdly, to a cause of action arising in, or the residence of the defendant within the territory comprised in the limits of the particular Division Court. Sec. 14 of ch. 8 of 43 Vict. is wide enough in its terms, if not restricted in its application to suits in amount within the jurisdiction, but brought in the wrong Division Court, territorially considered, to cover a cause of action which the Division Courts Act expressly enacts these Courts shall not have any jurisdiction over. The clause is as follows, as far as material : In all cases where a defendant, primary debtor, or garnishee, intends to contest the jurisdiction of *any* Division Court to hear or determine any cause, matter, or thing in such Court, he shall leave with the Clerk of the Court within eight days after the service of the summons on him (where the service is required to be ten days before the return) or within twelve days after the day of such service (where the service is required to be fifteen or twenty days before the return), a notice to the effect that he disputes the jurisdiction of the Court * * and in default of such notice disputing the jurisdiction of such Court, the same shall be

considered as established and determined, and all proceedings may thereafter be taken as fully and effectually as if the said suit or proceeding had been properly commenced, entered or taken in such Court." These last words—*as if the said suit or proceeding had been properly commenced, entered, or taken in such Court*—are not equivalent to, "as if such Court had jurisdiction over the cause, matter, or thing," and are more apt words to be used in relation to the want of jurisdiction in the particular Court in which the suit or proceeding was commenced, and not to the want of jurisdiction in all such Courts; and as this clause follows provisions in respect to suits brought in the wrong Division Court, it would seem to have been the intention of the Legislature to restrict its operation to suits so erroneously brought. Moreover, read in connection with section 10, which enacts: "Notwithstanding anything in the Division Courts Act contained, *any suit within the jurisdiction of the Division Court* may be entered, tried, and finally disposed of by the consent of all parties in *any Division Court*," it would seem impossible to hold that the Legislature could have intended to prevent suits not within the jurisdiction of the Courts, being tried therein where the parties concerned were willing and consented to their so being tried, and yet against the will of one of the parties because he had omitted to give a notice disputing the jurisdiction, to permit the trial. It is a rule that the intention of the Legislature in construing an Act of Parliament is to be gathered from the whole Act, and not from a clause thereof merely, and it is provided by section 68 of ch. 8, 43 Vic. that that Act is to be read with and as part of the Division Courts Act. So read in connection with clauses 53 and 54 of the former Act it can hardly be supposed that a Judge of the Division Court would try an action for slander or any tort for \$400, or if he did try it that the case would not be *coram non judice*, although no notice was given disputing the jurisdiction. I think, therefore, the absence of notice did not prevent the garnishees raising the question of jurisdiction. If the case

came within the class requiring notice its omission would be fatal, and it would be too late, even with the consent of the Judge, to question the jurisdiction after the time for giving notice had passed.

The next question is, is the proceeding beyond the jurisdiction of the Division Court to enquire into at all? There can be no doubt, I think, that the primary debtor could not have sued the garnishees in the Division Court to recover the money received in excess of the mortgage debt, putting aside the question as to whether such a claim constitutes a debt, because the claim to be investigated would involve a greater amount than a Division Court has jurisdiction to enquire into; but under section 124 of the Division Courts Act the power of the Court is not limited, at all events in express terms. It is as follows: “ * * When any debt or money demand of the proper competence of the Division Court, and not being a claim strictly for damages, is due and owing to any party from any other party, either on a judgment of any Division Court or otherwise, and *any debt* is due or owing to the debtor from any other party, the party to whom such first mentioned debt or money demand is so due and owing (hereinafter designated the primary creditor), may attach and recover, in the manner herein provided, any debt due or owing to his debtor (hereinafter designated the primary debtor), from any other party (hereinafter designated the garnishee), or sufficient thereof to satisfy the claim of the primary creditor, subject always to the rights of other parties to the debts owing from such garnishee.”

It is to be observed the primary creditor's rights is in this clause expressly limited to a “debt or money demand” of the proper competence of the Division Court, while the debt attachable is described as “any debt,” without limitation. Thus, unless the debt must be by force of section 54, only such a debt as the primary creditor could have sued his debtor for in the Division Court, there is no limit in amount to the jurisdiction in proceedings against a garnishee.

But I am of opinion the debt to be garnished must be one within the limited jurisdiction of the Division Court, as by sec. 136 of the Division Courts Act it is enacted "In all cases under this Act, and whether the claim of the primary creditor is or is not a judgment, the primary debtor, the garnishee, and all other parties in any way interested in or to be affected by the proceeding, shall be entitled to set up *any defence*, as between the primary creditor and the primary debtor, which the latter would be entitled to set up in an ordinary suit, and *also any such defence as between the garnishee and the primary debtor*, and may also shew any other just cause why the debt sought to be garnished should not be paid over or applied in or towards the satisfaction of the claim of the primary creditor." The want of jurisdiction in the Court to try the case is a defence open to the garnishee, and might be set up by him against the claim of the primary debtor, and is consequently a defence that may be set up against the primary creditor, and as a result of such a defence being allowed, the jurisdiction of Division Courts in proceedings to attach or garnish debts is limited to debts within the proper competence of such Court to try. This right to set up any defence open to the garnishee if he were sued by the primary debtor distinguishes this case from the decision in *Munsie v. McKinley*, 15 C. P. 50, which was a decision under the very different provisions respecting interpleader.

I am of opinion, therefore, that prohibition ought to be granted, and the objection to the jurisdiction in the Court below seems to have been sufficiently taken to entitle the garnishees to costs.

The summons will, therefore, be absolute, with costs.

CHANCERY CHAMBERS.

RE JOHN THOMAS SMITH.

A will directed an executor to pay to A. for life "the interest dividends and profits of certain stock, and of the moneys into which the said stock might be changed." Subsequently new stock was issued at par and 18 shares allotted to the executor. Not being accepted these new shares were sold and produced a premium of \$226.67, which was credited to the executor.

Held, that the premium was principal, and that A. was entitled only to the interest on it during her life.

[June 4, 1880.—*Proudfoot, V. C.*]

This was an application by the executrix, Anne Smith, for advice as to distribution of a fund between the life-tenant and those in remainder.

By his will the testator, who at his death owned fifty-four shares of stock in the Consumers' Gas Company, bequeathed among other things, as follows: "I further bequeath to my dear wife during the term of her natural life, the interest, dividends, and profits, which shall or may arise from time to time from the stock or shares which I shall be the holder of, or entitled to for my own use at the time of my decease, in The Consumers' Gas Company of Toronto, The Dominion Bank, and The Ontario Bank, and the dividends, interest, and profits, of the moneys or other securities into which the said several stocks may from time to time be changed or converted under the provisions of my will and codicil in that behalf. And I hereby direct my said executors and trustees to pay the said interest, dividends, and profits, to my said dear wife Anne during her natural life accordingly."

A considerable discrepancy is to be found in the cases cited of *Brander v. Brander*, 4 Ves. 800; *Irvine v. Houston*, 10 Ves. 187; *Witts v. Steere*, 13 Ves. 363; *Barclay v. Wainewright*, 14 Ves. 66; *Price v. Anderson*, 15 Sim. 373; *Preston v. Melville*, 16 Sim. 163. But they all were cases where the sums in question were paid out of the profits. This is sufficient to distinguish them from the present.

I think the tenant for life is entitled only to receive the interest on the \$226.67 during her life, and that sum ought to be considered as principal.

RE TOTTEN.

Taxation—Charge for attendances on—G. O. 608.

A Master or a single Judge has no discretion to allow a solicitor more than \$1 per hour for attendances on the taxation of a bill of costs, either between solicitor and client, or party and party : the tariff being fixed at that rate by G. O. 608.

[June 5, 1880.—*Proudfoot, V. C.*]

The facts appear in the judgment.

Mr. *Boyd*, Q. C., for the appellant.

Mr. *Hogles*, for Totten.

This is an appeal by a client who had obtained an order to tax her solicitor's bills, and who became entitled to the costs of the taxation, because on revision of the bill of her solicitor's costs his attendances have been reduced from special, as allowed by the Master at Woodstock, and only been allowed at \$1 per hour.

The order is in the usual form for taxation at the instance of the client. Under such an order only business done in the character of solicitor can be taxed ; and it includes an account of all sums received by the solicitor as such, not a general account : *Seton*, p. 609, 4th ed.

The items in this case are numerous, and upon a number of them witnesses were examined. Questions of considerable nicety were raised, in one instance whether the solicitor had been guilty of such negligence as to disentitle him to costs. But all were clearly subjects of taxation, and necessarily involved in proceeding upon an order to tax.

Solicitors' fees in the Master's office are regulated by General Order 608, the tariff of 1874, and while this tariff allows for attendance on Master's warrant, or appointment, or before a special examiner or referee on examination of witnesses, per hour \$1, to be increased in the discretion of the Master to \$2, it also provides that attendance on taxation per hour is \$1, without any power to increase. The Master's fees are regulated by Order 616, the tariff of 1875, which, while allowing him \$1.50 an hour for every attendance upon a reference, gives him only \$1 an hour for taxing costs.

No distinction is made between the taxation of bills between party and party, and between solicitor and client; both are placed on the same footing. Though in some cases the rule may work hardly in not giving adequate remuneration for a very troublesome and disagreeable duty, yet when some general rule had to be adopted applicable to the great majority of cases which it would regulate, I think the allowance sufficiently large.

I do not doubt that in a proper case the Court would have power to interfere with the discretion of one of its officers on the subject of taxation, but neither a taxing officer, nor a single Judge, has any discretion to exceed the amount specified by the tariff for taxing bills. In this case I do not find that the order contains any special matter of reference, which might bring it within the discretionary items in the tariff. All the charges are solicitor's charges. And the tariff, as I have mentioned, makes no distinction in favour of taxation between solicitor and client.

I think the revising officer was right; and I dismiss the appeal, with costs.

JELLETT V. ANDERSON.

Confirmation of report—When necessary—When execution may issue.

Where a decree ordered payment forthwith after the making of a report, an execution, issued before the report had been filed, was set aside, with costs.

Semble, the report did not require confirmation, under the wording of the decree.

[September, 1880.—*The Referee.*]

This was an application on behalf of the defendant to set aside a writ of execution issued by the plaintiff, and all proceedings taken thereunder, upon the ground that the report of the Master at Belleville, upon which the execution was founded, was not confirmed and absolute at the time execution issued, and also because the report was not filed at the date of issuing the execution. The decree ordered the amount to be paid forthwith after the making of the report.

Mr. Hoyles, for the appellant :—

The issue of the *fi. fa.* is irregular. The report must be filed before any proceedings are taken under it: *Bennett's Master's Office*, p. 22; *Smith's Chy. Prac.* p. 1040; *Daniell's Chy. Prac.* (1838) p. 944; *Rushton v. Troughton*, 2 Sim. 33. And as to the necessity for confirmation, see. *Smith's Chy. Prac.* p. 1040; *Bennett's Master's Office*, p. 23; *Beaven v. Gilbert*, 8 Beav. 308.

Mr. H. Cassels, contra :—

On the authorities cited the report does not require confirmation before issuing execution, as no further order or decree has to be made based on the report. A decree for payment forthwith after making the report, is not the same as one for payment after confirmation.

Nothing in our practice requires filing the report before issuing a *fi. fa.* The making the report by the Master is equivalent to entering judgment with him, in which case the R. S. O. ch. 66 sec. 72, applies.

Mr. Hoyles, in reply :—

The *fl. fa.*, was not issued by a Master but by a Deputy Registrar, a ministerial officer ; the judgment cannot be considered entered until the report is filed in Toronto. The statute cited is not applicable to the case.

THE REFEREE set the execution aside, with costs, on the ground that the report was not filed when process issued ; but held that the report did not require confirmation under the wording of the decree.

DODGE V. CLAPP.

Commission under G. O. 643—How apportioned—Objections—Practice.

In partition and administration suits, the commission in lieu of costs should be divided into equal fractional parts, and the parts allotted to the solicitors in proportion to the amount of work done by and the responsibility imposed upon them.

Objection to the commission allotted may be raised on a motion for distribution without previous notice of appeal being given.

[June, 1880, *Proudfoot, V.C.*]

This was a partition suit under General Order 640. The local Master, in apportioning the commission, had allowed four-fifths to the plaintiff, and one-fifth to the guardian of the infants. The plaintiff's interest in the estate was one-eighth, and that of the infants five-eighths. Upon motion for distribution the apportionment of the commission was objected to by the guardian.

Mr. Plumb, for the guardian :—

The proper mode for dealing with the commission fixed under General Order 643, is to divide it into fractional parts proportionate to the amount of work done by and the responsibility imposed upon each solicitor, irrespective of what the taxed costs of either would have been

under the former practice. This question can be raised now, without notice of appeal having been given, under the powers conferred by General Order 640.

Mr. Hamilton, contra :—

The amount allowed to the guardian was more than his taxed costs would have been. This question is raised too late. Notice of appeal should have been given.

PROUDFOOT, V.C.—This question is properly raised now. The division should be in fractional parts, proportionate to the work done and responsibility involved.

All papers having been praeipiced to Toronto it was referred to the Master in Ordinary to revise the apportionment.

THE MASTER IN ORDINARY.—I am of opinion that a fair division would be to give three-fifths to the plaintiff, and two-fifths to the guardian, who seems to have had a great deal of responsibility.

HILDERBROOM v. McDONALD.

Order to produce under G. O. 134—Not enforceable on a reference—Practice.

Orders to produce under G. O. 134. are made for the purposes of the hearing only, and such orders will not be enforced for the purposes of a reference :—the proper course is an application to the Master, to whom matters in dispute have been referred.

A decree was made at the hearing referring the matters in dispute to the Master.

Mr. Beck now moved for an order to compel the defendant to deposit in the office of the Deputy Registrar certain documents referred to in the affidavit on production of the

defendant, put in under the usual præcipe order, obtained before hearing, but not left with the Deputy Registrar ; or for an order to commit for failure to produce.

Mr. Hoyles, contra :—

The application is too late, as the plaintiff has obtained his decree. Discovery under præcipe order is only for the purposes of hearing, and the plaintiff having obtained his decree without these documents being filed, the Court will not now require him to do so: *Boyce v. McIntyre*. 7 P. R. 134; *Dobson v. Dobson*, 7 P. R. 256; *Western Canada Oil Co. v. Walker*, 6 P. R. 181; *Merchants' Bank v. Tisdale*, 6 P. R. 91.

The Master before whom the reference is pending can direct all documents to be brought in which are material to the reference, and he is the proper person to apply to. The Referee will not interfere with the conduct of proceedings in the Master's Office: *Nelson v. Gray*, 2 Chy. Chamb. 454; *Cottle v. Vansittart*, 2 Chy. Chamb. 396.

THE REFEREE refused the application, holding that the proper course was, to apply to the Master, who had power to cause all material documents to be brought in; and that the order to produce was only for the purposes of the hearing, and could not be afterwards enforced as sought.

DARLING V. DARLING.

Foreign commission—Cross interrogatories—Where filed—G. O. 221—Instructions to commissioners.

When a foreign commission issues on the Master's certificate, under G. O. 221, cross-interrogatories should be filed in the office of the Clerk of Records and Writs; and where they were filed by a defendant in the Master's office instead, and notice of filing given, but by accident the commission was forwarded without them, an application made on the return of the commission executed to suppress the depositions was refused, with costs.

1. Where the instructions directed that the depositions must be subscribed by the witness, and a witness could not write, the commissioner certified to that fact, and the interpreter and commissioner signed their names. *Held*, sufficient.
2. On the facts stated in the judgment, *Held*, that the interpreter was not such an agent or correspondent of the complainant as would justify the suppression of the depositions on that ground.
3. The commissioner was an Italian, and the instructions to him were in English: *Held*, no objection, as it did not appear that the commissioner was unacquainted with the English language.
4. That it did not appear that the commissioner took down the evidence. *Held*, immaterial, under the instructions set out below.
5. The depositions of the claimant were taken by one commissioner, and those of a witness by another. *Held*, also immaterial.

On appeal, PROUDFOOT, V.C., affirmed the Master's rulings above stated.

The points arose on a reference in an administration suit. Upon a certificate obtained from the Master under General Order 221, a commission was issued on the 13th of October, 1879, for the purpose of taking evidence at Naples, in the Kingdom of Italy, on behalf of Maria Columbrina Catuagno, a claimant.

The commission was returned executed, and was opened on the 10th of March, 1880, when it appeared that the commission had been executed without cross-interrogatories.

On the 13th of March, the commission evidence and exhibits attached, were put in as evidence in support of the claim of Maria C. Rossa (*née* Catuagno).

Mr. Bain thereupon applied to suppress the commission, on the ground stated in the first part of the judgment.

Mr. Walter Barwick, contra.

THE MASTER.—The defendant, William Darling, applies to suppress the depositions of witnesses examined on behalf of the claimant under a foreign commission, on the

ground that he has been deprived of the opportunity of cross-examining, by the neglect of the claimant's solicitors to forward the cross-interrogatories.

It appears that cross-interrogatories for the defendant were prepared, and that on the 6th of October they were filed in the Master's Office, a copy being on the same day served on the claimant's solicitors. The cross-interrogatories of the other defendants were on the 9th Oct. filed in the Records and Writs Office, and on the same day one of the claimant's solicitors bespoke the commission, at the same time leaving with the Clerk of Records and Writs the agreement, the validity of which is in question, for the purpose of its being sent with the commission. On the 13th he received the commission from a Clerk in the Records and Writ Offices, and at once despatched it to Italy. The position taken by the defendant's solicitor is, that he was not required to file his cross-interrogatories at all. Although under General Order 221, a foreign commission to take evidence upon a matter pending in the Master's Office, now issues on the Master's certificate without any order of the Court, yet he claims that that does not change the practice any further than merely dispensing with the order; that in other respects, every thing proceeds as if there were an order. In the order, in cases where that is necessary, nothing is said about filing cross-interrogatories. It simply provides that the party who is to cross-examine is, within so many days after receiving the interrogatories in chief, to deliver to the opposite party his cross-interrogatories, and that in default of his doing so, the party suing out the commission may send it without cross-interrogatories. His contention therefore is, that having served on the claimant's solicitors a copy of his cross-interrogatories, he did all that he could be required to do.

He, however, contends further, that even if the filing of the cross-interrogatories was necessary, the Master's Office was the proper place to file them, not the Records and Writs Office. For this, a passage in *Bennett's Practice* is relied on. Our General Orders are silent on the subject, and therefore

he claims that the practice which obtained in England in 1837, must still obtain here.

As far as I can learn, the old practice in England, where evidence had to be taken on proceedings under a Decree, was to file in the Master's Office the interrogatories and cross-interrogatories for the examination of parties, or for the further examination of witnesses already examined in the cause, but that was because such interrogatories and cross-interrogatories had to be settled by the Master. Interrogatories and cross-interrogatories, for the examination of witnesses not before examined, were not settled by the Master, nor filed in his office, but were filed with the examiner in London, or sent down to the country with the commission—(*Bennett's Practice*, page 13.) Here one of the persons examined was the claimant herself, but no question can be raised that the interrogatories and cross-interrogatories should have been settled by the Master. That has never been the practice here, at all events, not since parties could be examined on their own behalf.

On enquiring of Mr. Grant and of the present Clerk of Records and Writs, I am informed that the invariable practice, for certainly thirty years, has been to file in the Records and Writs Office the interrogatories and cross-interrogatories, and that such has been the practice even where the commission issues to take evidence upon matters pending in the Master's Office. When, on the appointment for proceeding upon the claim, the objection now taken was first stated, and before the affidavits were filed and the question argued, I inclined to the opinion that this being a commission, not to take evidence for all parties, but for the claimant only, her solicitors were bound to see that every thing was strictly regular. It seemed to me that a copy of the cross-interrogatories having been served upon them, they would be bound to see that a copy was annexed to the commission, even although none was proved filed in the Records and Writs Office. The affidavit of Mr. Barwick filed on the 2nd April, removes, however, any ground for so holding.

Bearing in mind that the practice for so many years has been to file the interrogatories and cross-interrogatories in the Records and Writs Office, he might well assume, on receiving the letter of the 6th October, which said, "We this day filed and served our interrogatories," that they had been filed in the usual course in the Records and Writs Office. Then on the 9th, the day that the cross-interrogatories of the other defendant were filed, the commission was bespoken, and Mr. *Barwick* says he explained to the Clerk of Records and Writs what was to be sent with it. Evidently Mr. *Barwick* supposed that everything was then in the Records and Writs Office. On the 13th, the commission was handed to him by a clerk in the Records and Writs Office, sealed up in an envelope, and addressed to the commissioner. He says he was not present when the commission was made out, and the papers annexed in the Records and Writs Office ; that when it was received by him, and when he despatched it to Italy, he had no reason to know or suspect that the cross-interrogatories were not annexed, and on the contrary he believed that they were annexed.

I cannot say, on the evidence before me, that the claimant's solicitors are in any way responsible for the unfortunate mistake which has occurred, and unless I am prepared to say that they are, I do not see how I can direct the depositions to be suppressed.

I must refuse the application, with costs.

Mr. *Ewart*, subsequently, on 10th April, 1880, on behalf of the defendant Herbert Darling, applied to suppress the commission upon the six grounds stated in the judgment.

Mr. *Moss*, contra.

THE MASTER.—The defendant, Herbert Darling, applies to suppress the depositions taken under commission, and six grounds for doing so are stated.

The first is, that the depositions of the claimant are not signed or attested by her in any way. The commissioner

certifies that she was regularly sworn, but the depositions are not signed. The instructions annexed to the commission are : " When the deposition is finished, it must be subscribed by the witness." At another place it is said, if a copy of the original draft be made, the witness is to sign such copy. Here the witness is certified by the commissioner to be unable to write her own name, and the deposition is signed by the interpreter and commissioner only. Possibly the instructions making no provision for the case of a marksman, the commissioner, an Italian notary, may not have considered it necessary that she should make her mark. The want of the signature is not, however, fatal to the admissibility of the depositions. In *Doe ex dem. Lemoine v. Raymond*, U. C. Q. B. 5 O. S. 337, where it did not appear even that the witness was sworn, and the depositions were unsigned, Macaulay, J., allowed the evidence to be read at the trial. On the motion for a new trial, the Court did not determine the objections taken to the commission, considering that there was other evidence sufficient to support the verdict.

In the case of *Hodges v. Cobb*, 8 B. & S. 583, the writ for the commission, in which the opposite party did not join, contained no direction for the depositions being signed, but the Judge's order upon which the commission issued, had these words : " I do further order that the deposition of every such witness be signed by him and by the commissioner." The evidence was returned, the depositions being unsigned, and received by the Judge at the trial, the clause in the order being held directory only. On a motion for a new trial, the Court upheld the Judge's ruling. Mr. Justice Blackburn said : " The directions in the order ought indeed to be obeyed," and, if " non-compliance with any direction in it has worked injustice, the Court in the exercise of its equitable jurisdiction would provide a remedy, either by granting a new trial on terms or otherwise. But here no injustice is shown, and consequently, there is no ground for the equitable interference of the Court."

The Court further expressed the opinion that a strict

and literal compliance with the directions in an order for a commission for the examination of witnesses abroad, is unnecessary. Here, I do not see that any injustice has been done by the omission to sign the depositions, and therefore disallow the objection.

The second objection is, that the interpreter, F. T. Turner, has been the agent and correspondent of the plaintiff and the claimant, and is therefore an interested party, and should not have been such interpreter. It is quite true that "no person can take part in the execution of a commission, who is not wholly indifferent"; Per Sir John Leech, in *Cooke v. Wilson*, 4 Madd. 380. And in *Lord Mostyn v. Spencer*, 6 Beav. 138, depositions were suppressed where the commissioner was the nephew and agent of the plaintiff. I do not think Turner was such an agent as would justify my suppressing the depositions on the ground that he acted as interpreter. He is the surviving partner of the Banking firm through whom all payments to the claimant had been made by William Darling. The plaintiff wrote to him for a statement of what moneys had been paid, and appears to have sent him a copy of David Darling's will. This he read to the claimant, and she says she then learned for the first time she had been deceived. Then the defendant Herbert Darling wrote to him sending a power of attorney in favour of the plaintiff to be executed by her. He procured her execution of this, and returned it to Montreal. After the commission had been sent to Italy, the plaintiff wrote to him urging haste in its execution, and he has corresponded with him, not on the subject of the evidence to be given, but solely urging a speedy execution of the commission, and the payment of the commissioner's fees. Had the commissioner been communicated with directly to that extent, I do not see that it would have been objectionable.

The third objection is, that the commissioner who took the deposition of the claimant is an Italian, unacquainted with the English language, and unable to know the correctness either of the interpretation of the interpreter's or

of the defendant's answer; or of the correctness of the certificate signed by him relating to the oaths administered, or the manner of taking the depositions. It does not appear that the commissioner is unacquainted with the English language, and in the absence of something positive to show he was, I must presume, as the Court in somewhat similar circumstances did in *Atkins v. Palmer*, 4 B. & A. 381, that he understood it.

The fourth objection is, that it does not appear in the deposition or certificate attached, that the commissioner took down the evidence as required by the instructions. The words of the instructions are: "The acting commissioner may employ a clerk if he thinks proper to copy the deposition. If a copy of the original draft be made, the witnesses must sign such copy. The acting commissioner shall in all cases take down the testimony, and the original draft, or the copy thereof, which shall be transmitted to the said Court, shall be written in a plain and legible manner." For anything that appears, the commissioner may have taken down the evidence with his own hand, and what is now returned may be a copy of the evidence so taken. In *Aitkis v. Palmer*, already cited, the depositions originally taken down were not returned, but a translation of them, made six weeks afterwards by the interpreter. These were admitted as evidence. On the objection being taken that under the instructions the oral statement of the witnesses should have been rendered into the English language at the time it was taken, and that this not having been done, the commission was not duly executed, Abbott, C.J., said: "We are to presume that the commissioners have discharged their duty, if by reasonable interpretation we can do so. We are not to look out critically for objections, nor are we blindly to give credit to all they have done, but we are to see whether they have substantially discharged their duty."

The instructions, it will be observed, provide for a copy being made, if the commissioner thinks proper, and where a copy is made it is not said that both the original draft

and the copy are to be transmitted to the Court. It is the original draft or the copy which shall be transmitted.

The fifth objection is, that under the instructions the commission should be executed by one commissioner only ; but contrary thereto, the depositions of the claimant were taken by the one commissioner, and those of Reford the witness, by the other. The commission was directed to Amillo Vescia and Nicola Santa Maria, or either of them, and the instructions on this head are "only one commissioner shall act in the execution of the commission, and if from any cause the commissioner to whom the commission is forwarded shall be unable or unwilling to act in the execution thereof, then the commission is to be executed by the other commissioner named therein."

I think there is nothing in this objection. The claimant was examined on the 4th February at Naples, before Amillo Vescia ; the witness, Reford, had to be examined at Capri, an Island in the Bay of Naples, and his evidence was taken on the 9th of February, before the other commissioner ; the reason assigned in the certificate being, that Vescia was by reason of illness unable to go to Capri. The solicitors for the respondents were at this time pressing the immediate execution of the commission ; and I had just about that date, on their own application, limited the time within which the commission should be returned to the 15th of March.

The sixth objection, that the instructions are inapplicable to the case of a commissioner unable to speak or understand English, has no force. For the instructions drawn up by an officer of the Court the claimant is not responsible, and besides it does not appear that the commissioners could not speak or understand English.

The application to suppress the depositions must be dismissed, with costs.

On appeal, PROUDFOOT, V. C., declined to interfere with either of the Master's judgments.

RE BENDER.

Improvements—Will.

The Court, under special circumstances, allowed money to be expended in improvements on a certain property of a testator who had directed by his will that the rents and profits of all his property should be expended in payment of debts, and in the support of his wife and children until the youngest child should come of age.

[November 8, 1880.—*Spragge, C.*]

By his will, C. B. devised to his wife "the whole of his real and personal estate, upon trust, to take and receive all the rents and profits thereof, and thereout to pay all and any amounts due on the house on John street, and also the one on King street, and also just debts, and to support herself and children until such time as the youngest child shall attain the age of twenty-one years;" and then to divide as directed. There were six children, the youngest of whom was four years and ten months old.

This was an application by the widow for leave to raise by way of mortgage on the King street property \$13,000 at $6\frac{1}{2}$ or 7 per cent., and therewith to pay off certain existing mortgages, amounting to \$11,000 at 8 per cent., and with the balance to put up an addition in the rear of the said building. The premises in question were leased to piano manufacturers for a term which would shortly expire. The warehouse not being large enough for them to transact their business, they offered, if an addition was put up in the rear of it, to renew for a term, and pay \$100 yearly, in reduction of the cost of the addition, and 10 per cent. on such cost by way of rental so long as their tenancy lasted.

It appeared that the addition would considerably increase the value of the property as well of the lessees' business.

It also appeared that the testator had been a member of the lessees' firm, and part of his personal estate consisted of a bond from them for the testator's share of the busi-

ness. It was considered that the payment of the amount of the bond would be accelerated by an extension of the lessees' business.

Mr. Murray, for the applicant, cited *Hood v. Bridgeport*, 16 Jurist 560; *Dent v. Dent*, 30 Beav. 360; *Simpson on Infants*, p. 355; *Baker v. Strong*, 4 W. R. 401.

SPRAGGE, C., granted the application.

KNOWLTON v. KNOWLTON.

Alimony—Security for costs—Nominal plaintiff—Waiver.

A petition by the defendant to reduce the amount of alimony allowed in the suit, came on to be heard on the 5th of October, when counsel for the plaintiff appeared and procured an enlargement for two weeks to answer the defendant's affidavits, and on the same day demanded and received copies of them. On the 19th October, the counsel appeared and obtained a further enlargement for two weeks, but before the time expired applied for an order for security for costs, on the grounds stated below.

Held, without expressing an opinion on the merits, that the plaintiff had waived her right (if any) to such security.

[November 15, 1880.—*The Referee.*]

[November 30, 1880.—*Proudfoot, V. C.*]

This was an alimony suit, and a decree had been pronounced in favour of the plaintiff, on the 19th December, 1877. The Master had fixed the amount to be paid to the plaintiff by the defendant, at \$108.00, per annum; and the defendant presented a petition to this Court, to have the amount of alimony reduced, on the ground, amongst others, that the value of property had depreciated, and the defendant was no longer able to pay such a large sum.

The petition came on to be heard on the 5th October, 1880, when counsel for the plaintiff appeared, and procured an enlargement for two weeks, to answer affidavits. On the same day, the plaintiff demanded and obtained copies

of the defendant's affidavits. On the 19th of October following, the plaintiff's counsel asked for and obtained a further enlargement for two weeks ; but before the time expired the plaintiff served notice of the present application for an order for security for costs, on the grounds : (1) that the petitioner was insolvent ; and, (2) that the application, though made in the name of the plaintiff, was really for the benefit of a third person, John Nelson Knowlton.

Mr. Hoyles, for the plaintiff, read several affidavits in support of the application, shewing that the petitioner was in very poor circumstances ; that John Nelson Knowlton had purchased the farm belonging formerly to the defendant, and had undertaken to support him, and pay the alimony in question. He argued that the defendant had no interest whatever in the result of the petition, whereas John Nelson Knowlton had every thing to gain by the reduction of the payment for alimony. He cited *Mason v. Jeffrey*, 2 Chy. Chamb. R. 15 ; *Little v. Wright*, 16 Gr. 576 ; *Pinchy v. O'Neil*, 7 P. R. 52 ; *Boice v. O'Loane*, 7 P. R. 339.

Mr. Black, for the petitioner, contended first that the plaintiff, if ever entitled to the order asked for, had waived the right by asking for enlargements, and procuring copies of the defendants: *Daniell*, 5th ed., pp. 30 & 31 ; *Mallory v. Mallory*, 7 P. R. 446 ; *Atkins v. Cooke*, 3 Drew. 694 ; Secondly, that the petition in question was in the nature of a cross-bill, or bill of review, according to the old practice, and a plaintiff to a cross-bill would not be ordered to give security for costs : *Daniell*, 5th ed., and the cases there cited. And third, he argued on the merits, that the case of *Mason v. Jeffrey*, had no application since the petitioner had a direct interest in the result of the petition ; and his indigent circumstances formed no ground for ordering him to give security for costs.

Mr. Hoyles, in reply, cited : *Ex parte Seidler*, 12 Sim. 106 ; *Murrow v. Wilson*, 12 Beav. 497, to shew that there had been no waiver, and also argued that it clearly appeared from the affidavits and depositions that the plaintiff was

still interested in the question of alimony, and that the plaintiff had never actually consulted a lawyer as to the matter of the petition, but that the whole transaction was that of the son.

THE REFEREE reserved judgment, and finally made the order for security, as asked by the plaintiff.

From this order the defendant appealed.

The appeal was argued by the same counsel.

PROUDFOOT, V.C., after reserving his decision, allowed the appeal, without expressing an opinion as to the merits, upon the ground that the plaintiff had waived her right, (if any) to security for costs. He rested his judgment upon *Mallory v. Mallory*, 7 P. R. 446, and the cases therein cited. As the suit was for alimony, the appeal was allowed, without costs.

Appeal allowed.

HENDERSON v. SPENCER.

Vendor and purchaser—Title by foreclosure—Presumption of death—R. S. O. ch. 109, sec. 3.

Where a bill was served on a defendant personally, and about a year afterwards a final order of foreclosure was granted in the suit :
Held, that a purchaser was not entitled to insist on the plaintiff (the vendor) proving that the defendant was alive when the final order was made.
Held, also, that on an application under sec. 3, R. S. O. ch. 109, the question of the abandonment of the contract between the parties cannot be raised.

[January 17, 1881.—*Spragge, C.]*

This was an application under R. S. O. ch. 109, sec. 3, for the opinion of the Court.

Henderson, as mortgagee of the land in question, filed his bill for foreclosure on 28th July, 1875. The bill was

served personally on the defendant, one McNaughton. A final order of foreclosure was granted on the 10th April, 1876. Henderson subsequently entered into an agreement to sell with Spencer, who objected to complete the sale, in the absence of proof that the defendant McNaughton was alive when the final order was made.

Mr. *Small*, for the vendor, contended that the production of the order was sufficient, as the Court would presume the order regular and parties *sui juris* till the contrary was shewn: *Gunn v. Doble*, 15 Gr. 655; *Shaw v. Crawford*, 4 App. R. 371; *Dart* on V. and P. last ed. 303. The defendant McNaughton, being served personally with the bill on the 28th July, 1875, the presumption was, that he was alive still; the presumption of death arising only after seven years absence without tidings: *Doe dem. Hagerman v. Strong*, 4 U. C. R. 510.

Mr. *Hamilton*, contra, contended that the affidavits in reply set up an abandonment of the contract in question, and not being traversed that the Court should not entertain the application; there being no contract, the purchaser had no right to be brought before the Court on a summary application. The vendor's proper remedy is by bill: *Re Burrowes*, L. R. 5 Chy. Div. 601; *Re Eaton*, 7 P. R. 396.

Mr. *Small*, in reply. The question of abandonment cannot be entertained on this application: R. S. O. ch. 109 sec. 3.

SPRAGGE, C.—The question of abandonment of the contract cannot be raised on the application under section 3 of the statute. No suspicious circumstances are shewn by the purchaser to rebut the presumption of law that McNaughton is still alive. The objection of the purchaser is invalid, and the application should be granted, with costs, without prejudice to any right the purchaser may have to file a bill to have the contract rescinded, or to resist suit for specific performance.

FERGUSON V. ENGLISH AND SCOTTISH INVESTMENT COMPANY.

Mortgage—Costs of sale under power—Summary taxation of—42 Vic. ch. 20, sec. 11, O.

42 Vic. ch. 20, sec. 11, O., authorizing the taxation of a mortgagee's costs by any party interested, without any order to tax, applies to mortgages executed before the passing of the Act.

[January 11, 1881.—*The Master.*]

THIS was an application, under 42 Vic. ch. 20, sec. 11, O., on behalf of a subsequent encumbrancer, to tax the costs of proceedings under a power of sale in a mortgage. The mortgage had been executed before the passing of the Act, and contained a power to sell.

Mr. W. Davidson objected to the taxation, on the ground that the above section was not retrospective, and applied only to costs of proceedings under mortgages executed after the passing of the statute.

Mr. G. H. Watson, contended that the section authorized the taxation, as although other sections of the same Act applied only to mortgages executed afterwards, this section had no words in it, which prevented its application to costs of sale proceedings under mortgages made before that date, and it was intended to apply to all mortgages.

THE MASTER held, that the section referred to authorized the taxation of costs of proceedings under powers of sale in mortgages executed before the passing of the Act, as well as in those executed after that date.

RAE V. TRIM.*

County Court—Equity side—Injunction—Counsel fees before Master sitting for Judge.

The County Court on its equity side had power to grant an injunction in any case coming within its jurisdiction. The fact of the title to land coming in question did not oust the jurisdiction of the County Court on its equity side. Where evidence taken before the Master sitting for a Judge was entered in the decree as having been taken in Court, the same fees were taxed to counsel before the Master as before a Judge.

[October, 1880.—*The Master in ordinary.*]

The plaintiff, the owner of lot 8 in the first concession of the Township of Mornington filed a bill to restrain the defendants from closing up a roadway leading through their land to his lot.

This application arose out of the objection of the plaintiff to have the costs taxed on the higher scale, the bill having been dismissed, with costs.

Mr. Hoyles, for the plaintiff, contended that the subject matter of the suit is within the jurisdiction of the equity side of the County Court : the mere fact of an injunction being prayed for does not oust the jurisdiction of the County Court, as is contended. The restriction as to title to land only refers to the common law side of the Court. The Judge must be taken to have found the value of the land to be less than \$20. The fact of the bill not having been filed on the lower scale does not prejudice it. The omission to file a certificate at any time can be remedied : *Ferguson v. Routledge*, 18 Grant 511. The counsel fees are excessive, and only one fee should be allowed. The Master having taken the evidence in the absence of the Vice-Chancellor, no greater fees should be allowed than if carried on in the Master's Office.

Mr. Fisher (Stratford), *H. Cassels*, contra:—

The fact of title to land being called in question, and of an injunction being asked for, ousts the jurisdiction of the County Court : *Brough v. Brantford N. & P. B. R. W. Co.*, 25 Grant 43.

* The case was reported in 27 Gr. 374.

The rest of the argument appears by the judgment.

THE MASTER.—There is nothing in the pleadings to show me the value of the subject matter involved, or that it does not exceed the sum of \$200. The Vice-Chancellor in his judgment does not fix the value of the property. It simply appears from his judgment, and the answer of one of the defendants, that the defendant was, before the institution of the suit, willing to sell to the plaintiff a right of way over his lot for \$15. The bill seeks to have a way established across several lots, not only over the one owned by the defendant, who was willing to sell for the \$15. Very likely his offer to sell for \$15 was simply by way of doing a neighbourly act. The mere quantity of land taken cannot be a test of the value of the subject matter involved. We having a road to his lot, which was the real object of the plaintiff's bill, may be of very great value. Then the plaintiff has chosen to file his bill on the higher scale. Evidently when he commenced the suit, and until he found that he must fail, and was liable for costs, his estimate of its value exceeded \$200. The costs should, therefore, be taxed not upon the lower but the higher scale. The objection was taken that as the title to the land was called in question, the suit could not have been instituted, before 1868, on the equity side of the County Court. I do not think there is anything in this objection.

The 8 Vic. ch. 13, which was dealing with the District Courts entirely as Courts of law, provided that they should have jurisdiction in certain cases to the amount of £25, £50, and £20, respectively, where title to land shall not be brought in question.

The 16 Vic. ch. 119, which conferred equity jurisdiction on the County Courts in certain cases, provided that the jurisdiction of the County Courts should extend to the several matters enumerated, and that the County Courts should possess the like power and authority in respect to the matters enumerated, as "by law is now possessed by the Court of Chancery of Upper Canada." One of the

matters enumerated was : " Any person seeking equitable relief for or by reason of any act, matter, or thing whatsoever, when the subject matter involved does not exceed the sum of £50." There was no limitation in such cases to those where titles to land were not in question.

The further objection was taken that in this suit an injunction was sought, which could not have been obtained on the equity side of the County Court. There is nothing in this objection either. The County Court could grant injunctions in any suit where the subject matter involved was within the limited amount.

The sub-section 9, which relates expressly to injunctions, gave these Courts jurisdiction to issue an injunction, and restrain waste by cutting, destroying, or removing trees or timber in any case, even though the amount involved was beyond the jurisdiction of the County Court; but such injunctions could remain in force only for one month.

As to the counsel fees allowed, I do not think they are excessive, when it is remembered that the examination of witnesses lasted two days, and that the case was afterwards argued in Toronto on the third day. Two counsel might be reasonably allowed in a case where such a mass of evidence was taken, as in this case.

It is objected that part of the evidence was taken before the Master, and that in respect of that only solicitor, not counsel, fees should be allowed. From the decree it would appear that all the evidence was taken in open Court.

As to the answers, I do not interfere with the Taxing Officer's allowance respecting them. Nor do I give effect to the objection that the parties were asked to make admissions, and neglected or declined to do so. I do not see that parties are bound to make admissions such as were asked for here ; and from the affidavits filed it would appear that the admissions, had they been made, would not have saved much of the evidence being taken.

PHERRILL V. FORBES.

Service by publication—Contents of notice—Praecipe decree.

Where a defendant is served by publication under G. O. 100, in order that a *praecipe* decree may be obtained, the notice should contain the special indorsement in Schedule G. to Order 436, otherwise the cause must be set down to be heard *pro confesso*.

[October, 1880.—*Proudfoot, V.C.*]

The bill had been served by publishing a notice in the form of Schedule C to Order 100. When the time for answering had expired the plaintiff's solicitor applied to the Registrar to issue the decree on *praecipe*; and, in support of the application, produced an affidavit as to the correctness of his claim.

The Registrar refused the application, because the special endorsement provided by Schedule G to Order 436 had not been incorporated in the notice published.

The plaintiff appealed.

Mr. *Fitzgerald*, for the appeal, argued that Order 646 was intended to dispense with the long notice, as it provided that the plaintiff must produce an affidavit certifying his claim, which was not done in ordinary cases where the defendant was served in person,

PROUDFOOT, V.C., held that the Registrar's construction of the orders was correct, and that as the defendant had no knowledge of the amount claimed by the plaintiff from the notice served, the case must be set down to be heard *pro confesso*.

ELLIOTT v. GARDNER.

Dismissing bill for want of prosecution—Non-production.

In a suit to set aside a conveyance of the equity of redemption in certain lands as fraudulent against creditors, one sitting of the Court having been lost, a defendant, the grantee of the equity of redemption, moved to dismiss the bill for want of prosecution. More than two weeks before the sittings commenced, the plaintiff's solicitors were notified to file replication and proceed to a hearing, but did not do so. The excuses offered by the plaintiff were that the defendant was a material witness, and was absent prior to the hearing, and that the property had been sold under a power of sale contained in one of the mortgages, and little or no surplus remained after paying the mortgagees. It appeared that no efforts had been made to find the defendant in order to subpoena him as a witness at the hearing, and that the sale of the land did not take place until a month after the sittings at which the cause might have heard.

Held, that the delay was not excused, and the bill should be dismissed.

Held, also, that failure of the defendant to comply with an order to produce did not, under the circumstances of the case, deprive him of the right to move to dismiss.

Semblé, that a plaintiff cannot, in answer to a motion to dismiss, ask to have the bill dismissed without costs, but must make a substantive motion for that purpose.

[November 30th, 1880.—*The Referee.*]
[November 30th, 1880.—*Proudfoot, V.C.*]

The bill was filed and a *lis pendens* issued on the 3rd of March, 1880, by a simple contract creditor of Andrew Gardner, Sr., to set aside as fraudulent a deed by A. Gardner, Sr., conveying the equity of redemption of the lands in question to his son, A. Gardner, Jr. Two mortgages to which the deed was subject were not impeached. The bill was taken *pro confesso* against A. Gardner, Sr.

The answer of A. Gardner, Jr., was filed on the 31st of May, 1880, setting up the defence of a *bonâ fide* purchaser for value without notice. An order to produce was taken out and served by the plaintiff on the 10th of June. The defendant did not file any affidavit on production. One had been prepared for A. Gardner, Jr., by his solicitor, but was not sworn to. He was examined on the 30th June, and on such examination produced all the documents he had to produce, and his solicitor forgot to have the affidavit sworn to and filed.

On the 26th August, the solicitors of the defendant, A. Gardner, Jr., wrote to the plaintiff's solicitor to file replication and set down the case, or they would move to dismiss.

The sittings were held on the 14th September, 1880, but replication had not been filed, nor case set down. The 30th of August was the last day for setting down.

The property was sold by public auction, under the power of sale in one of the mortgages, on the 13th October, and the amount realized only left a very small balance after paying the amount due on the mortgages.

A motion by the defendant, A. Gardner, Jr., to dismiss for want of production, came on before the Referee in Chambers, on the 21st October, 1880.

The affidavits filed on behalf of the plaintiff stated that a bailiff had, in July, endeavoured, without success, to serve the defendant, A. Gardner, Jr., with notice of the sale proceedings, and had been informed that he was evading service : that the said defendant was a necessary and material witness for the plaintiffs ; and owing to the said defendant not being able to be found, the plaintiffs could not safely go to a hearing at the last Chancery sittings on the 14th of September, as it was during that time that the defendant was absent.

Also, that the property had been sold under the power of sale in one of the mortgages, and thus the subject matter of the suit had passed away ; and that as the defendants were utterly worthless, a further prosecution of the suit after sale was useless. Affidavits in reply shewed that the sale took place on the 13th of October, and that the defendant had during the summer been several times in Wingham, where the plaintiffs and their solicitor resided, and might have been subpœnaed.

THE REFEREE made an order directing the plaintiff to proceed to a hearing, or in default the bill to be dismissed, costs to be costs in the cause.

The defendant appealed.

Mr. *Langton*, for the appeal. Replication not having been filed, and case not having been set down, the defendant, under G. O. 273, 275, and 276, and *Finnegan v. Keenan* 7 P. R. 385, is entitled to have the bill dismissed, with costs, unless the plaintiff excuses his failure to bring the case to a hearing, and shews that he has used due diligence in prosecuting the suit. This he has failed to do. The sale having taken place a month after the sittings can be no excuse. No effort was made to serve the defendant with a subpoena, and even if he had been absent, the plaintiff could have given notice under R. S. O., ch. 62, sec. 18, that he required the defendant as a witness.

Mr. *Hoyles*, contra. The order of the Referee is a reasonable one, and such orders are so much in his discretion that a Judge in appeal should hesitate to review the discretion of the Referee. The plaintiffs were not bound to give notice under the Revised Statutes; and in view of the sale which they must have known was about to take place, and the poverty of the defendants, they were justified in waiting to see whether the sale would result in a surplus which would make it worth while their going on with the suit. As the sale had rendered the further prosecution of the suit useless, except for the purpose of deciding the question of costs, the plaintiffs should be allowed to dismiss the bill without costs, or have the question of costs disposed of in Chambers, which offer they now make. They are entitled to ask this in answer to the motion to dismiss, and may read the affidavits filed in answer to the motion in support of what they ask. See *Merchants' Bank v. Musgrave*, 7 P. R. 59; *Ventilation and Sanitary Imp., Co. v. Edelsten*, 11. W. R. 613, 2 New. Rep. 53; *Mulholland v. Downs*, 2 Chy. Ch. 233; *Devlin v. Devlin*, 3 Chy. Ch. 491. The defendant is in default for not filing an affidavit on production, and is not in a position to move to dismiss. His motion should therefore have been dismissed: *Walters v. Burrell*, 6 P. R. 269.

Mr. *Langton*, in reply. It is too late to make any offer respecting the disposition of the costs, after such delay in

the prosecution of the suit. The defendant is in a position to dismiss for want of prosecution. That being now his right, he should not be compelled either to go to a hearing on the question of costs, or have that question disposed of in Chambers. The plaintiffs cannot ask that the bill be dismissed, without costs, in answer to a motion to dismiss. A substantive motion for the purpose must be made : *Pinfold v. Pinfold*, 9 Ha. app. 14 ; *Lancashire and Yorkshire R. W. Co. v. Evans*, 14 Beav. 529. The fact of the sale, in this case is not a sufficient reason for allowing the bill to be dismissed, without costs. It is not a matter occasioned by some act of the defendant, or a fact which the plaintiffs could not have foreseen when filing their bill : See *Morgan & Davey on Costs*, p. 50. The plaintiffs only filed their bill in respect of the equity of redemption, which has turned out to be of no value. Fraud is charged, and the defendant, however poor in circumstances, is entitled to require the plaintiffs to proceed to prove their charge, or have the bill dismissed, with the costs which he has incurred in resisting the charge. The defendant is perhaps technically in default, but that does not prevent his moving to dismiss. He is only prevented from moving where he is in contempt, and the mere omission to file an affidavit does not place him in contempt : proceedings must be taken for that purpose : *Gillespie v. Gillespie*, 2 Chy. Ch. 267 ; *Franco v. Meyer*, 2 Hem. & M. 42. He has never made substantial production, and the plaintiff does not come complaining of a default and asking for production, but merely sets it up to excuse his own laches, which he cannot do : *Gillespie v. Gillespie, supra*, and *Wilson v. Black*, 6 P. R. 130.

PROUDFOOT, V. C.—The practice in cases of this sort is laid down in *Finnegan v. Keenan*, 7 P. R. 385. The plaintiff must excuse his delay or the bill be dismissed. Here no attempt was made to subpoena the defendant as a witness at the hearing, and even if such attempt had been made without success, a notice under Rev. Stat. ch. 62, sec.

18, might have been served on his solicitor if the plaintiffs had really wished to proceed to a hearing. The sale which took place subsequently to the Goderich sittings could not serve as an excuse for not setting the case down. As the result of the case shews that the equity of redemption in respect of which the bill was filed was not worth anything, I must, I think, for the purposes of such a motion as the present, presume that there was no fraud. An offer is made on the part of the plaintiffs to dismiss the bill without costs, or to have the question of the costs disposed of in Chambers. The defendant refuses these offers, and insists on the bill being dismissed for want of prosecution. The plaintiffs not having excused their delay, I do not think I should deprive the defendant of his right to have the bill dismissed.

I think, too, that the neglect to file an affidavit on production does not prevent the defendant from moving. The reason for not filing the affidavit is satisfactorily explained. The bill will be dismissed, with costs as against the defendant who moves.

MOORE v. BOYD.

Examination of a co-defendant adverse in interest—Construction of G. O. 128—Costs.

A defendant, whose interest is identical with that of the plaintiff, is a party adverse in interest to his co-defendant, and may be examined by his co-defendant under G. O. 138. When the plaintiff's solicitor is present at such examination it may be read at the hearing against the plaintiff. The successful defendant will be allowed the costs of such examination.

[January 24th, 1881.—*The Master in Ordinary.*]

The bill was filed to compel specific performance of an agreement made between the plaintiffs' deceased father and the defendant Boyd. The defendant Margaret Moore, the widow of the deceased, had formerly filed a bill for the same purpose, but the suit had been settled out of Court.

Margaret Moore refused to be joined as a co-plaintiff in the present suit, and was accordingly made a party defendant. In the course of the suit, the defendant Boyd examined his co-defendant, Margaret Moore. The bill was dismissed, with costs. The taxing officer refused to tax to the defendant Boyd his costs of examining his co-defendant. The point was argued before the Master in Ordinary.

Mr. *Moffatt*, for the defendant Boyd, contended that the defendant Moore was a party adverse in interest to the defendant Boyd, within the meaning of G. O. 138, as appeared from the pleadings and her own examination : that it was a perfectly proper step to examine her for discovery, she being the only person from whom discovery could be made : that the plaintiffs having been present and joined in her examination, it could be used against them at the hearing, and they were estopped from objecting now.

He cited *Proctor v. Grant*, 9 Gr. 26 ; *Moffatt v. Prentice*, 6 P. R. 33 ; *Court v. Holland*, 8 P. R. 219.

Mr. *Watson*, for the plaintiffs, argued that it was not sufficient to shew that the defendant Moore's interest was not identical with that of her co-defendant ; it must be shewn that it was adverse : that G. O. 138 does not provide for the allowance of costs of "procuring evidence," provided for in a recent English Rule of Court : *Mackley v. Chillingworth*, L. R. 2 C. P. Div. 273. He also cited *Douglas v. Ward*, 11 Gr. 39 ; *Dickson v. Covert* 2 Ch. Chs. 342 ; *Morgan & Davey on Costs*, 87.

The Master, after reserving his decision, gave judgment as follows :

THE MASTER IN ORDINARY.—In my opinion the defendant Boyd was a "party adverse in point of interest" to the defendant Margaret Moore, and therefore entitled to examine her under G. O. 138.

The defendant Margaret Moore, and the plaintiffs (her children) were in exactly the same interest, and in her examination she says candidly that she was instrumental in having the suit brought—it was brought at her wish, at her instance and that of the children—she gave the instructions for it to the solicitor. The bill alleges that she refused to be made a party plaintiff, and one can very well see why she was not joined as a plaintiff. A former suit had been brought for exactly the same purpose as this one, which she, acting for her children, compromised on receiving a sum of money, thinking all the time, she says, that the children could bring the suit ever again. Looking at the dates of the transactions to which the suit relates it may fairly be assumed that she is the only person from whom discovery could be obtained.

Then the solicitors for the plaintiffs attended upon the examination and cross-examination, so that in my opinion, her examination so taken could have been read at the hearing even against the plaintiff.

It seems to be thought, from my judgment in *Court v. Holland*, 8 Pr. Rep. 219, that my opinion is, that in any case the depositions taken on an examination for discovery of one defendant could now be read at the hearing against another. That is not the case. The answer of a defendant can be read against himself, and so can his examination for discovery, that being treated as part of his answer. On a motion for decree it is different. A plaintiff could always read the answers of one defendant against another, by giving notice of his intention to do so; and, in like manner, he could read the examination of one defendant against another. But the plaintiff could read these only by treating them as affidavits filed in the cause, and the defendant against whom they were to be read could file affidavits in answer to them, just as he could to any affidavits filed in behalf of the plaintiff. Of course this was before the passing of G. O. 270, which limits the class of cases which may be heard on motion for decree.

The defendant Boyd should have the costs of examining the defendant Margaret Moore.

DOUBLEDEE V. CREDIT VALLEY RAILWAY COMPANY.

Jurisdiction of County Courts on the equity side—Costs on the lower scale.

Where a cause was properly within the equity jurisdiction of a County Court, but the defendants resided in a different county from that in which the land in question was situated, the costs were ordered to be taxed on the higher scale.

[December, 1880.—*The Master in Chancery.*.]

The bill was filed by the owner of land in Oxford to enforce an agreement for purchase. Usual decree for \$134.

Mr. *I. Campbell*, and Mr. *Jameson*, for the defendants objected to taxation on the higher scale, the subject matter involved being within the jurisdiction of the County Court on its equity side.

Mr. *Nesbitt*, contra. By the County Courts Act, sec. 34, C. S. U. C. ch. 15, the claim must be filed and proceedings carried on in the county where the defendants reside. The defendants must be taken to reside in this case in the County of York, their head office being situated in Toronto: *Hartford v. Hartford*, 3 Conn. 15. The County Judge of the county of York could not make any orders affecting land out of his own county; such a power is confined to his own county. Unless expressly excepted by statute, as in the case of *fl. fa.* lands, the powers of these inferior Courts should not be extended. A reference on title might be asked for, and no procedure is provided for such a purpose by the County Court Act: *Lawrason v. Fitzgerald*, 9 Gr. 371; *Seath v. McIlroy*, 2 Ch. Ch. 93. In case of a sale the purchaser would require a vesting order; also an injunction.

THE MASTER IN ORDINARY.—I think the costs are properly taxable on the higher scale. The tendency of the Judges seems to have been to confine the proceedings of the County Court on the equity side to the analogous process on its common law side, and this appears to be the

fair construction of the statute, and the meaning of the Judges in the cases referred to; to which may be added *McLeod v. Millar*, 12 Gr. 194; and *Dobbie v. Kitchen*, decided by Spragge, C., on 3rd December, 1879, not reported.

COMMON LAW CHAMBERS.

REGINA v. CLENNAN.

Certiorari—Conviction—Several offences—32 & 33 Vic. ch. 31, sec. 25, D.

The defendant was convicted before a magistrate for that he “did in or about the month of June, 1880, on various occasions,” commit the offence charged in the information ; and a fine was inflicted “for his said offence” :

Held, that the conviction was bad, under 32 & 33 Vic., ch. 21, sec. 25 D., as showing the commission of more than one offence.

[November 2, 1880.—*Wilson, C. J.*]

This was an application for a writ of *certiorari* in order to quash a conviction, the defendant having given the usual six days’ notice to the convicting magistrates and the Clerk of the Peace. On the return of the notice,

Beck, for the defendant, supported the application.

Ferguson, Q.C., for the other parties, shewed cause.

The grounds of the application are set out in the judgment.

WILSON, C. J.—The defendant was convicted for that he “did in or about the month of June, A.D., 1880, on various occasions, knowingly and fraudulently sell and supply to Malcolm Wallace, the proprietor of a certain cheese factory in the village of Brussels, a large quantity of milk, from which the cream had been taken, for the purpose of being manufactured into cheese, contrary to the statute.”

The statute is contained in the Revised Statutes of Ontario, ch. 159.

It was objected, among other objections taken, that the date was uncertain on which it was said the defendant "did in or about the month of June, 1880, on various occasions, knowingly and fraudently sell," &c.

As to this objection, it is not so much that the date is uncertain, as that the conviction shews the commission of more than one offence; because it alleges that the defendant, in or about the month of June, *on various occasions, did knowingly and fraudently sell*, &c. Every such sale constituted an offence, and *every occasion* on which the sale was made was a new and distinct substantial offence.

The 32 & 33 Vic. ch. 31, sec. 25, D., enacts that "every complaint shall be for one matter of complaint only, and not for two or more offences."

Where trespass is laid with a *continuando*, or alleged to have been committed on divers days and times, it is done for the purpose of preventing the bringing of several actions. And where the cause of action is so laid, the plaintiff may prove several distinct acts of trespass: 1 *Wms. Saund.* 24 n. 1, 6th ed.; 1 *Ch. on Plg.*, 6th ed. 258; *Hume v. Oldacre* 1 Starkie R. 351.

The conviction is objectionable in this respect; and it is made still worse by fining the defendant for his said *offence*, in the singular number, the sum of ten dollars, besides costs.

I shall not at present go into the enquiry whether the Statute of Ontario is or is not *ultra vires*, although the defendant argued it was. As the case was argued on the merits, on the motion for a *certiorari*, the writ will now go; and on the return of it the order will be made to quash the conviction.

IN RE MURPHY AND CORNISH.

Conviction—Appeal—Prohibition.

Held, that the prosecutor of a complaint cannot appeal from the order of a magistrate dismissing the complaint ; as by R. S. O. ch. 74, sec. 4 the practice of appealing in such a case is assimilated to that under Dom. Stat. 33 Vic. ch. 47, which confines the right of appeal to the defendant. A prohibition was therefore ordered, but without costs, as the objection to the jurisdiction had not been taken in the court below.

[January 15th, 1881.—*Osler, J.*]

One Murphy laid an information before the Police Magistrate of the town of Windsor, against one Cornish, for taking greater costs in respect of a distress than are allowed by statute (R. S. O. ch. 65.) The Police Magistrate found that the complaint was not proved, and dismissed it, adjudging the complainant to pay to the defendant \$1.35 costs of defence. Murphy thereupon appealed to the General Sessions, held in the month of June, 1880, and the following order was made : “ It is ordered by the Court that the within order be quashed, with costs. This to end the case.” At an adjourned Session the costs were taxed at twenty dollars, and ordered to be paid in twenty days. A summons was obtained by the defendant for a prohibition to the Sessions, on the ground of want of jurisdiction to make these orders.

W. R. Mulock, shewed cause.

Aylesworth, supported the summons.

OSLER, J.—It was contended that these orders were void : that the Sessions had no jurisdiction ; that no appeal lay at the instance of a complainant to re-hear a case which the magistrate had dismissed, or if it did, that the Sessions should have disposed of the case, and not merely have quashed the order appealed against, thus leaving the original complaint or information to stand.

Chapter 114 of the Con. Stat. of Upper Canada, sec. 1, provided that in case a person, *complainant* or *defendant*,

thought himself aggrieved by an order, decision, or conviction, before any justice, or in any matter cognizable before such justice, not being a crime, he might, in the manner thereby provided, appeal to the Sessions, and that Court was empowered to hear and determine the matter of such appeal, and make such order therein with, or without costs, as might seem meet. Section 3 shews that it was the original complaint which was tried on the hearing of the appeal.

That Act was repealed by the 38 Vict. ch. 4, Ont., now with later amendments consolidated in R. S. O. ch. 74, Section 3 of which enacts that any "party" who considers himself aggrieved by "a conviction or order," made by a justice of the peace, police magistrate, &c., under the authority of any statute now or hereafter in force in Ontario, and relating to matters within the legislative authority of the Province, may, unless otherwise provided by the particular Act under which the conviction or order is made, appeal therefrom to the General Sessions of the Peace.

Section 4 enacts that in such case the practice and proceedings on the appeal, and preliminary thereto, and otherwise in respect thereof, shall be the same as the practice and proceedings under the statutes of the Dominion then in force on an appeal to the General Sessions, from a *conviction* before a justice, made under the authority of a statute of Canada, except that either of the parties to the appeal may "adduce evidence in addition to the witnesses called and evidence adduced at the original hearing." The appeal in the latter case is given, and the practice and proceedings regulated by 33 Vict. ch. 27 D. The appeal is given to "any person who thinks himself aggrieved by any conviction or order." Then sub-sec. 2 provides that the person aggrieved shall give to the *prosecutor* or *complainant* a notice in writing of the appeal within four days after such conviction or order. Sub-sec. 3 provides for the hearing of the appeal. If the appeal is dismissed or the conviction or order affirmed, the Court is to "order and adjudge the *offender* to be punished according to the con-

viction, or the *defendant* to pay the amount adjudged by the order, and to pay such costs as may be awarded ; " and where the conviction or order is quashed on appeal, the clerk of the peace is forthwith to endorse on the conviction or order a memorandum that the same has been quashed. The form of the notice of appeal given by sec. 4 refers to the conviction or order as " a certain conviction (*or order*), whereby the said A. B. was convicted of having, *or* was ordered to pay," and requires the offence to be stated as in the conviction, &c., or the amount adjudged to be paid, as in the order, &c.

It is evident that under this Act, and the Act of which it is an amendment, 32-33 Vict. ch. 31, the Act relating to summary convictions, no appeal is given to a prosecutor whose information is dismissed. The practice and proceedings are applicable only to an appeal by an "offender" or a "defendant," and although an "order" as distinguished from a "conviction" may be appealed from, the first sec. of 32-33 Vict. ch. 31, shews that the order meant is an order made *on a complaint* in relation to any matter in which the justice has authority by law to make an order for payment of money or otherwise; and secs. 54 and 55 shew that there is a distinction between conviction and order and an order of dismissal. See also secs. 37, 38, 41, 42, 43.

When the Legislature of Ontario took away the right of appeal which had been given to "a person, *complainant* or *defendant*," who thought himself aggrieved by an order, *decision*, or conviction of a justice of the peace, made under the authority of a statute of Ontario, and conferred it instead upon any "party" who considered himself aggrieved by a *conviction or order*, and provided at the same time that the practice and proceedings on the appeal should be the same as under the statutes of the Dominion, in which, as I have shewn, no appeal is given to a prosecutor, an "order" does not mean order of dismissal of a complaint; I think it necessarily follows that no appeal is given to the prosecutor of a complaint laid under a Provincial statute.

The words *conviction or order* must upon every principle of construction be held to mean the same in both statutes. Besides, unless some power was expressly given to the General Sessions to convict and impose punishment on an appeal against the dismissal of an information, as was expressly done in Con. Stat. U. C. ch. 114, it is difficult to see whence the Sessions could derive their authority to act.

On the whole, I think there is no reason to doubt that no appeal lies against an order of dismissal, and that the Sessions in making the orders now complained of have acted without jurisdiction.

The order for prohibition must go, but without costs, as the objection to the jurisdiction was not taken in the Court below.

IN RE THOMSON ET AL. AND THE VICTORIA RAILWAY COMPANY.

Railway Co—Bondholders—Registration—Mandamus.

A trustee held certain debentures of a railway company on trust to secure certain creditors of the company for advances made by them, which debentures were to be handed over to the creditors for sale, upon the company making default in payment of the advances. The company made default, and the debentures were delivered over to the creditors : Held, that the creditors were entitled under 34 Vic. ch. 43, sec. 33, to be registered as holders of the debentures, to enable them to qualify and vote for directors ; and that a *mandamus* should issue to compel the company so to register them.

[January 25, 1881.—Wilson, C. J.]

This is an application for a mandamus to compel the company to register certain bonds in order that the holders might vote thereon.

An agreement, dated the 1st of August, 1877, was made between the Victoria Railway Company, of the first part, and Robert Barber, Christopher Wm. Bunting, William Thomson, and Walter Copp, called the Syndicate, of the second part.

By the agreement the company was forthwith to assign to the Syndicate their right to the Dominion subsidy of 1877, granted by the 40 Vic. ch. 14:

Their right to the unexpended portion of the subsidy granted by the Provisional County of Haliburton in aid of the company, amounting, with interest, on the 1st of July instant, to \$31,000, and upwards :

And also the right to the issue of \$49,000 of debentures of the Canadian Land and Emigration Company, limited now being made :

And should also hand over to a trustee, as afterwards mentioned, within three months from the date of this agreement, debentures of the company which the company contemplated shortly issuing, to the extent of \$270,000, being the equivalent of \$12,000 per mile on 22½ miles of the Victoria Railway between Kinmount and Haliburton :

Upon the assignment and transfer of the company's interest in these securities the Syndicate should provide funds for the company, on its notes, at a bank or banks in Toronto, to the amount of \$315,000, to be applied in the construction and equipment of the Victoria Railway, from Kinmount to the village of Haliburton :

The advances made, together with interest at eight per cent., to be computed from the dates of advances, were to be repaid by the company to the Syndicate on or before the 31st December, 1879 :

The securities which were to be assigned to and held for the Syndicate were to be applicable to the payment of their advances; and the interest thereon, and the proceeds of any sales of such securities, should be applied part in payment or reduction of interest and then of advances."

The said issue [*i. e.*, 22½ @ \$12,000 per mile] of \$270,000 of debentures, to be placed in the hands of Mr. M. C. Cameron, in trust to deal with as therein mentioned.

Then follow provisions that if the issue of debentures by the company be at the rate of \$12,000 per mile the Syndicate should receive it to and for their own use; but if they are empowered by the Syndicate to reduce that issue

to \$6,000 per mile, the compensation to the Syndicate should be debentures of the company to the extent of \$40,000, to and for their own use.

The following are the terms upon which Mr. M. C. Cameron is to hold the debentures, to the amount of \$270,000 :—

1. To deliver over to the Syndicate, on their performing their part of the agreement, \$40,000 in such debentures.

2. To hold the remainder of the debentures as security to the Syndicate for payment of the said advances and interest until payment of the advances and interest has been made.

3. To hand over the debentures referred to, or a sufficient portion thereof, to the Syndicate if the company should make default in payment of the sum of \$315,000 and interest, as aforesaid, or of any part thereof, to be sold by the Syndicate in such manner as to them may appear expedient, and to be accounted for by the Syndicate to the company in respect and in payment of the said advances and interest.

The coupons for interest on the said debentures of the company, matured prior to the time when the parties should be entitled to the delivery of the debentures, should be cut off before the delivery thereof by the said Cameron to the parties entitled thereto.

The company might make sales of the debentures held by Mr. Cameron as security for the Syndicate at not less than 40c. on the \$ before reduction, or not less than 80c. on the \$ after reduction; and might also sell the Government subsidy at not less than par; but in certain cases the whole proceeds of sales should belong to the Syndicate, and should be receivable by them to the extent necessary to pay such advances and interest.

The rate was reduced from \$12,000 to \$6,000 a mile.

The company did not pay the Syndicate.

The trustee, M. C. Cameron, by reason of the default of the company to pay the Syndicate their advance, and the interest thereon, by the 31st December, 1879, delivered

to the Syndicate the debentures of the company, which he held in trust under the agreement mentioned.

The Syndicate made the present application for a *mandamus* to compel the company to register the names of the Syndicate as holders of such debentures under the statute, which is as follows:—

34 Vic. ch. 43, sec. 33, The company may issue bonds for the purpose of raising money for the purpose of prosecuting the said undertaking, which shall without registration or formal conveyance be the first and preferential claim and charge upon the undertaking and property of the company, real and personal, then existing, or at any time thereafter acquired; and each bondholder shall be deemed to be a mortgagee and incumbrancer *pro rata*, with all the other holders thereof upon the undertaking of the company. And provided also, that in the event at any time of the interest upon the said bonds remaining unpaid and owing at the next ensuing annual general meeting of the company, all holders of bonds shall have and possess the same rights and privileges, and qualifications for directors and for voting as are attached to shareholders; provided that the bonds and transfer thereof shall have been first registered in the same manner as is provided for the registration of shares; and it shall be the duty of the secretary of the company to register the same on being required to do so by any holder thereof."

Cattanach, for the company, opposed the application for a *mandamus* to compel the company to register the bonds, because the bonds were not delivered to the Syndicate, but to Mr. Cameron *as a trustee as security to the Syndicate* for payment of their advances and interest until the same should be paid. And although the Syndicate were to have *handed over to them the debentures by the trustee* upon default by the company to repay the advances and interest by the 31st of December, 1879; yet it was only to enable the bonds "to be sold by the Syndicate in such manner as to them might appear expedient, and to be

accounted for by the Syndicate to the company in respect and in payment of the said advances and interest," and that the Syndicate became by such delivery of the debentures to them trustees of and for the company of the same. And by analogy to shares in a company, the trustees for the company of these bonds cannot register, and cannot do so for two reasons.

First, because the Syndicate represent the company as to those bonds, and

Second, because if they represented any *other* body or person, they, the Syndicate, have not the absolute and beneficial right in themselves. He cited *Ex parte Willocks*, 7 Cowen, (N.Y.) 402, 410; *Ex parte Holmes*, 5 Cowen, (N.Y.) 426; *Abbott's Digest*, Law of Corporations, p. 460, secs. 48, and 132; *Field on Corporations* (1877) p. 251, 253, and note; *Angell & Ames*, 10th ed., 102, 103; *Merchants' Bank v. Cook*, 4 Pick. 405; *In re City Terminus Hotel*, L. R. 14 Eq. 10; *In re Gloucestershire R. W. Co. v. Bartholomew*, L. R. 3 Ex. 24; *Pulbrook v. Richmond*, 9 Ch. Div. 610.

MacLennan, Q. C., in support of the application, contended that Mr. Cameron, by the agreement, held the bonds for the Syndicate as security for the payment of their advances and interest, and in case of default by the company "to hand them over to the Syndicate, to be sold by the Syndicate in such manner as to them may appear expedient, to be accounted for by the Syndicate to the company in respect of their advances and interest."

WILSON, C. J.—The Syndicate are the beneficiaries of these bonds. They hold them as security for their advances and interest, with the power to sell them; and, of course, to account to the company for the application of the proceeds, which application will no doubt be in the first place for and towards the reduction or repayment of their own claim.

I find it laid down that a *trustee* having the legal interest may be a registered shareholder, even against his consent, but not the *cestui que trust*; and that a mortgagee

can, because he has this legal interest, be also registered, but that an equitable mortgagee cannot.

The text works state these facts positively, and the cases they cite, to which I have referred, fully maintain the statement.

In this case there is reason to believe that the creditors of the company have not the best security for their demand, at any rate they are quite as much, and perhaps more, interested in the welfare of the road, as the first mortgagees of the undertaking, than the shareholders; and I cannot conceive how they can do anything prejudicial to the shareholders without at the same time injuring their own rights, and they should, under these circumstances, be allowed to have some voice in the management of the affairs of the company.

In my opinion the order should go for the issue of the *mandamus*, with costs.

GHENT v. MCCOLL—CANADA PERMANENT LOAN AND
SAVINGS COMPANY, GARNISHEES.

Judgment debtor—Attachment—Costs—R. S. O. ch. 50, sec. 304.

Held, that a judgment creditor, whose judgment is for costs only, cannot examine his judgment debtor under R. S. O. ch. 50, sec. 304, nor garnish debts due to him.

A judgment creditor in such a case may examine his judgment debtor under R. S. O. ch. 49, sec. 17.

[February 3rd, 1881.—Mr. Dalton, Q.C.]

In an action of ejectment the plaintiff recovered the land and judgment for costs. A debt being due from the Canada Permanent Loan and Savings Company to the defendant, the plaintiff obtained a summons to attach the amount.

Caswell, for the plaintiff.

Henderson, (Ferguson, Bain, Gordon & Shepley,) for the defendant.

Leonard, (Jones Bros. & McKenzie,) for the garnishees.

MR. DALTON held that a judgment creditor, whose judgment is for costs only, is not within section 304 of R. S. O. ch. 50, and can neither examine under that section (though he may under R. S. O. ch. 49, sec. 17), nor garnish debts due his judgment debtor: section 304 requiring a judgment for a substantial cause of action.

MORGAN v. AULT.

Pleading—County Court—Abatement.

The defendant pleaded to an action in a Superior Court, on a writ specially endorsed for \$410, that there was a suit pending in a County Court, brought by the plaintiffs against the defendant, for the same cause of action.

Held, that the plea should aver that the cause of action in the first suit was within the jurisdiction of the County Court.

[February 10, 1881.—Mr. Dalton, Q.C.]

This was an action on a promissory note, the writ of summons being specially endorsed for principal and interest, amounting to \$410.84. The declaration claimed \$450. Defendant pleaded in abatement that there was a previous action pending in the County Court for identical causes of action. It appeared that a writ had been issued in the County Court, specially endorsed in the same manner as the writ in the present action, and that it had been served and an appearance entered by the defendants. The plaintiff obtained a summons to strike out the plea as embarrassing.

Aylesworth, shewed cause.

Hellmuth, supported the summons. He contended that the plea should aver that the County Court had jurisdiction. The writ in the County Court was a nullity, it being endorsed for an amount beyond the jurisdiction of that Court. He cited *Donelly v. Reid*, 5 P. R. 51; *Hodgson v. Graham*, 26 U. C. R. 127; *Campbell v. Davidson*, 19 U. C. R. 222; *Bleakley v. Jay*, 13 M. & W. 464.

MR. DALTON held that the plea should aver that the former action was within the jurisdiction of the County Court.

Summons absolute.

PORRITT V. FRASER.

Arrest—Attachment—Costs—R. S. O. ch. 50, sec. 343.

Defendant was arrested and held to bail for a debt alleged by plaintiff to be \$704, but the plaintiff recovered only \$489. As to \$80 which the plaintiff failed to recover it was held, on the facts stated below, that he had no reasonable ground for believing defendant to be liable, and he abandoned it at the trial, but as to the other portion, for which he failed, he had reasonable ground:

Held, that defendant was entitled to tax his costs of defence against the plaintiff, under R. S. O. ch. 50, sec. 343.

(February 15, 1881.—*Osler, J.*)

This was an application by the defendant for leave to tax his costs of defence against the plaintiff, pursuant to the Common Law Procedure Act, R. S. O. ch. 50, sec. 343, on the ground that the latter had arrested and held him to bail for a larger sum than had been recovered by the verdict, without reasonable or probable cause. The arrest was made for \$704, and the verdict was for \$489.50.

Part of the plaintiff's claim consisted of an item of \$140, of which nearly \$80 was for goods which he had supplied to the defendant's mother. The defendant swore

that he had never given any undertaking to the plaintiff or to any one else to be responsible for this account, and the plaintiff, without attempting to support it, abandoned it at the trial. The only reason the plaintiff gave for having held the defendant for it was, that having been instructed, as the mother's agent, to collect from the defendant interest due on a mortgage from him to her, she told the plaintiff that she had agreed with the defendant that if he would pay this account and others she would not press him for the interest on the mortgage ; and she told the plaintiff to collect the account from the defendant. It did not appear that the plaintiff ever had any communication with the defendant on the subject of this agreement.

Holman, for the defendant, supported the rule.

J. E. Rose, shewed cause.

OSLER, J.—In *Hope v. Fenner*, 2 C. B. N. S. 387, a decision upon a Statute similar in terms to ours, it is said that in order to determine whether a creditor is liable to costs for having, without reasonable or probable cause, made an affidavit of debt, regard must be had to the surrounding circumstances and to the law, and not merely to the belief operating on his mind at the time.

I am obliged to hold that the plaintiff had no reasonable or probable cause for arresting the defendant for the \$80 in question. In the absence of some valid agreement by the defendant with him and the mother to assume the account, the plaintiff ought to have known that he had no ground for charging it against him , and he had, as to that sum, no reasonable ground to expect when he made the arrest that he could prove himself entitled to recover it: *Lewis v. Ashton*, 1 M. & W. 493.

As to the other portion of his claim which the plaintiff failed to recover, I think he had very good reason to believe himself entitled to it. He has, however, failed as to a substantial part of his demand ; and this, under the

circumstances, entitles the defendant to have his rule made absolute. It appears to be the practice to give the defendant the costs of the application ; but in taxing them the Master is to allow for one affidavit only.

Rule absolute, with costs.

REGINA EX REL. KELLY V. ION.

Municipal Election.—Qualification.—Quo warranto.—43 Vic. ch. 24, sec. 3.

Held, under 43 Vic. ch. 24, sec. 3, that in estimating the defendant's property qualification, the amount of the mortgages upon the property must be deducted from the assessed, and not from the real value.

[February 19, 1881.—*Osler, J.*]

Davidson moved absolute a writ of *quo warranto* calling on John Ion to show cause why he should not be removed from the office of councillor for the village of Oakville, on the ground of want of property qualification. The property on which the defendant qualified was assessed at \$1,600, and upon it there was a mortgage for \$1,500. The relator claimed that under 43 Vic., ch. 24, sec. 3, the property qualification was clearly insufficient. He cited *Regina ex rel. S. Fluett v. Lemandie*, 5 P. R. 19.

Tizard, for defendant, put in affidavits to show that the real value of the property was \$2,800. He contended that the amount of the mortgage should be deducted from the real value, and not from the assessed value, in order to arrive at the amount of the defendant's property qualification.

OSLER, J., held that under the R. S. O., ch. 174, sec. 70, it is clear that the assessed value of the property only can be looked at in arriving at the amount of the property qualification.

Summons made absolute to unseat defendant, with costs, and for a new election.

LOUNT V. CANADA FARMERS' INSURANCE COMPANY.

Execution—Mutual Insurance Company—R. S. O. 161. sec. 61.

Under R. S. O. ch. 161, sec. 61, writs of execution against a Mutual Insurance Company cannot be issued until after the lapse of three months from the recovery of judgment.

Held, that this section applies equally in the case of a policy issued on the cash principle, and of one upon the premium note system.

[February 17, 1881.—Mr. Dalton, Q.C., Osler, J.]

Holman, obtained a summons calling upon the plaintiff to show cause why the writs of execution issued in this cause, and placed in the lands of the sheriff of Wentworth, should not be set aside, with costs, on the ground that the defendants were a Mutual Insurance Company, within the provisions of Revised Statutes of Ontario, ch. 161, and that the said writs of execution had issued within three months of the recovery by the plaintiff, contrary to the provisions of sec. 61 of that Act.

Stoddart, (Cameron, Appelbe, and McPhillips,) shewed cause, and urged that sec. 61 did not apply to this case, in that the Insurance Policy under which the plaintiff recovered was upon the cash principle, and as it was not on the premium note principle, sec. 61 was not applicable. *Storm v. Canada Farmers*, 22 C. P., 82; *White v. Agricultural*, 22 C. P. 98; *Welsh v. Niagara District*, 27 C. P., p. 134.

Holman, in support of summons. Sec. 61 is clear in its provisions and applicable to a case like this, although the premium was paid in cash. There is no distinction in this section between the two cases. Sec. 75, of ch. 161, shows that the makers of the premium notes are liable for the losses incurred in the branch of the Company acting on the cash principle. He also cited *Fair v. Niagara District*, 26 C. P. 398.

MR. DALTON, after reserving judgment, made the summons absolute setting aside the executions.

A summons was obtained in appeal before Armour, J., calling upon the defendants to shew cause why the above order, made by Mr. Dalton, should not be reversed, and the said summons obtained by the plaintiff discharged

Holman, shewed cause.

McPhillips, supported the summons.

OSLER, J., discharged the summons with costs, agreeing with Mr. Dalton that sec. 61 applied to this case, as well as where the policy was issued upon the premium note principle.

REGINA EX REL. MITCHELL v. DAVIDSON.

Municipal election—Quo warranto—Disclaimer—Costs.

Defendant was elected to the office of councillor for a town, and accepted the office. Subsequently, and before the issue of the writ of *quo warranto*, the defendant knowing that his election was to be contested, sent the following instrument to the council :—"Palmerston, February 7th, 1881. To the Mayor and Council of the Town of Palmerston : Gentleman, I beg to disclaim my seat at the council board. (Signed) G. S. Davidson."

Held, that the above disclaimer, not being in the form prescribed by R. S. O. ch. 174, sec. 194, was not sufficient to relieve the defendant from costs.

[March 1, 1881.—*Osler, J.*]

A summons was obtained at the instance of the relator to set aside the election of the defendant as a councillor for the town of Palmerston, on the ground that he was disqualified "by reason of his being a shopkeeper licensed to sell spirituous liquors by retail," and also on the ground that his property qualification was insufficient. Previously to the issue of the writ of *quo warranto*, the defendant having learned the intention of his opponents to contest the election, he determined, as he stated in his affidavit,

to abandon all claim to the office, and accordingly he delivered to the clerk of the council, at a meeting held on the 7th of February, 1881, an instrument in the following terms :—

“ Palmerston, February 7th, 1881.

“ To the Mayor and Council of the Town of Palmerston.

“ Gentlemen.—I beg to disclaim my seat at the Council Board.

(Signed) “ G. S. DAVIDSON.”

This was read to the meeting, and allowed to lie upon the table. It was sworn, however, that the defendant sat and voted at the meeting at which this took place. The writ of summons in this case was issued on the 8th of February, and served on the 11th of February. On the 8th of February the defendant drew up and signed, and delivered to the clerk, what he called a “formal resignation” of his office, which was not produced upon this application. This resignation was accepted by the council at a meeting convened on the 11th of February. Pending the proceedings, the defendant delivered to the Clerk in Chambers a disclaimer under section 192 of the Municipal Act.

The only question argued upon the return of the summons was, whether the disclaimer was sufficient to relieve the defendant of costs.

Hellmuth, appeared for the relator.

Caswell, shewed cause.

OSLER, J.—The disclaimer filed with the Clerk in Chambers serves no purpose; for the affidavits satisfy me that the defendant assented to his nomination, and accepted the office ; and I see no reason, so far as that disclaimer is concerned, to exercise any discretion as to costs in his favour. As to the other, the Municipal Act R. S. O. ch. 174, sec. 194, provides, where there has been a contested election, the person elected may, at any time after the election, and before his election is complained of, deliver

to the clerk of the municipality *a disclaimer*, signed by him, *as follows* :—

“ I, A. B., do hereby disclaim all right to the office of Township Councillor (*or, as the case may be,*) for the township of (*or, as the case may be,*) and all defence of any right I may have to the same.”

Section 195: “ *Such disclaimer shall relieve the party making it from all liability to costs ; and where a disclaimer has been made in accordance with the preceding sections, it shall operate as a resignation, and the candidate having the next highest number of votes shall then become the councillor, or other officer, as the case may be.*”

A short, plain, and simple form of disclaimer is thus given by section 194. It is required to be “*as follows*”; that is to say, in accordance with the form given, not as the disclaimer mentioned in section 192, given after the proceedings have been commenced, “*to the effect following.*”

I think there is reason for the difference. In the one case it is to be acted upon by the council, or those objecting to the election, without judicial direction, and terms are used which leave no room for doubt as to what is meant by them. In the other it may very well be left to the Judge who disposes of the case to determine, in dealing with the costs, whether the defendant has substantially disclaimed his right to the office by the formula he has made use of.

I do not think the relator was bound to speculate upon the meaning of the informal instrument delivered to the council in the present case, and to take the chance of the council refusing to act upon it, or to accept defendant's subsequent resignation.

I am of opinion that the disclaimer was not effectual, and that the relator is entitled to his costs.

Order made accordingly.

**THE CANADIAN BANK OF COMMERCE V. CROUCH, TRUSTEES
OF SPADINA AVENUE METHODIST CHURCH, GARNISHEES.***Attachment—Attorney's lien—Costs.*

In garnishee proceedings a Court of law will, as against the attaching creditor, protect an attorney's lien for costs of the action or suit in which or by which the debt attached has been recovered, where the garnishee has notice of the lien.

A Court of Equity will restrain a creditor who has obtained an attaching order at law from enforcing it against a fund recovered by means of a suit in Equity, to the prejudice of the attorney's lien for costs in that suit.

The lien extends only to the costs incurred in the particular suit or proceeding, and not to the attorney's general costs against the client in other matters.

[March 18, 1881.—*Osler, J.*]

An attaching order was made in this cause on the 16th of September, 1880, attaching all debts due and owing by the garnishees to the judgment debtor. On the return of the summons calling upon them to shew cause why the debt attached should not be paid over, the solicitors of the judgment debtor appeared and claimed a lien for their costs in a suit then pending, and about to be set down for hearing in the Court of Chancery between the judgment debtor and the garnishees for the recovery of the debt. An issue was directed, "if the judgment creditors desired it," on the trial of which the solicitors rights were to be determined, but no order was ever taken out. Meantime the suit referred to was proceeded with, and a decree was made therein referring the matter in dispute to arbitration. On the 7th of February, 1881, an award was made in favour of the judgment debtor against the garnishees for \$451.10, each party was to pay his own costs of suit and of the reference: the arbitrator's fees to be borne equally.

The summons referred to was then re-opened, and the solicitors still insisting on their lien, the learned Clerk of the Crown in Chambers referred the matter to a Judge.

Wilson, (Morrison, Wells & Gordon,) appeared for the attaching creditors.

Hearn, (Morphy, Winchester & Morphy,) for the solicitors.

OSLER, J.—The affidavits filed on behalf of the judgment creditors and the solicitors enter into matters which are beside the merits of the case, and there is much conflict of statement as to whether the Chancery suit and the arbitration were carried on by the latter for, or at the request of the former. In the view I take of the solicitors' rights I do not think that is material, but the affidavits on the whole satisfy me that these proceedings were conducted with the knowledge, and at least the tacit acquiescence and approval of the judgment creditors, who only refrained from taking out an order, and proceeding with the trial of an issue thereon, because a suit was pending in which the amount of the debt could be ascertained.

The solicitors claim to be paid their costs of that suit and of the arbitration which was directed therein, as being the costs of proceedings by which the debt now sought to be garnished and paid over, was recovered; and they also claim a right to be paid certain other costs which they have against the judgment debtors.

The 313th section of the C. L. P. Act, R. S. O. ch. 50, provides, that if the garnishee suggests that the debt sought to be attached belongs to some third person, or some third person has a lien or charge upon it, the Judge may order such third person to appear before him and state upon oath the nature and particulars of his claim upon such debt.

2. After hearing the evidence of such third person, or in case he does not appear, the Judge may bar his claim or make such other order for the determination of the matter in dispute, either by the trial of an issue or otherwise, as he thinks fit, upon such terms, in all cases, with respect to the lien or charge of any such third person, and as to costs, as he thinks fit and reasonable. These sections correspond, with some slight verbal differences, with sects. 29 and 30 of 23 & 24 Vict. ch. 126, Imp. Act.

The parties who claim the lien or charge in this case are regularly before me, and the facts relating to their claim fully appear upon the affidavits.

The only question is, whether the attaching order obtained by the judgment creditor is paramount to the solicitors' demand, whether it be called a lien for costs or a claim upon the equitable interference of the Court in his favour. I shall speak of it hereafter as a lien, as that expression, though said to be inaccurate with reference to a judgment, is very generally used throughout the cases I have to refer to, and every one understands what is meant by it. In *Hough v. Edwards*, 1 H. & N. 171, decided in 1836, the Court of Exchequer, (Pollock, C. B., and Martin and Alderson, BB.,) held that the general lien of an attorney on a judgment for costs due from his client, did not prevail over an attachment under the garnishee clauses of the Common Law Procedure Act.

It was referred to the Master to ascertain (1) whether there was any particular lien in the cause in which the judgment debt attached had been recovered, and (2) whether there was any special agreement between the attorney and the judgment debtor, that the former should retain the damages recovered in that action against the attorney's bill of costs. The Master found both questions in the negative, and certified that it was conceded that the attorney's general bill was more than sufficient to cover the amount of the judgment debt garnished.

This case decides nothing more than that the attorney has no lien as against the attaching creditors for his general bill, and the fact that the Court referred it to the Master to ascertain whether a particular lien existed, indicates to my mind, that they would have protected the attorney as to such costs, if it had been necessary to do so. The case of *The Bank of Upper Canada v. Wallace*, 2 P. R. 352, decided in February, 1858, followed *Hough v. Edwards*. There was nothing in question but a general lien. The *Queen v. Benson*, 2 P. R. 350; merely decides that the garnishee clauses of the C. L. P. Act did not extend to the Queen. The Court expressed an opinion that an attorney's lien for costs would not be permitted to stand in the way of the attachment order. Part of the costs in

question there, were the costs in the particular suit in which the judgment sought to be attached was recovered.

The next case at law is *Eisdell v. Coningham*, 28 L. J. Ex. 213, decided in 1859. There the plaintiff obtained an order attaching a judgment debt recovered by the judgment debtor for £54 and costs. The garnishee, who had full notice of the claim of the judgment debtor's attorney for costs, paid the debt garnished to the judgment creditor. The money was thereupon ordered to be paid into Court, and the attorney for the judgment debtor moved that it should be paid out to himself: *Hough v. Edwards*, 1 H. & N. 171, was cited. The Court, Pollock, C. B., and Martin, Bramwell, and Channell, BB., held that the judgment creditor, knowing of the lien of the attorney, had no right to receive money equitably belonging to another, and the money was ordered to be paid to the attorney.

Sympson v. Prothero, 3 Jur. N. S. 711, 26 L. J. Chan. 671, was decided in 1857. In this case, the defendants as executors of Thomas Prothero had been sued by one Phelps for damages for breach of contract by their testator. They brought a suit of *Prothero v. Phelps* to restrain that action. The plaintiff Sympson was solicitor for Phelps in both suits. An order was made by the Court in the suit of *Prothero v. Phelps*, by which Messrs. Prothero were ordered to pay Phelps £500 damages, and £100 costs, in respect of the action at law. Upon these sums, in all £600, Sympson the solicitor claimed a lien for all his costs in both suits. One Morgan, having a judgment against Phelps, obtained a Judge's order in the action of *Morgan v. Phelps*, directing the Messrs. Prothero, as garnishees of the sum of £600 due by them to Phelps, to pay the same to him as Phelps' judgment creditor. Thereupon the attorney Sympson filed a bill against Prothero, Phelps and Morgan, to have his lien declared, and to restrain any proceedings by Morgan to recover the £600 under his common law order.

It was urged by counsel for Morgan that his title was

paramount. Wood, V. C., said, p. 712, "The plaintiffs have a clear lien on the fund, * * This is a fund which is recovered in a successful action, clearly the solicitors of the successful party have a lien on that fund for their costs, i. e., for the outlay, skill, and exertions, by means of which the fund has been recovered. This fund is the fruit of those services and outlay, for which they therefore have a claim in preference to Morgan." It appears from the report in the Law Journal, that the garnishees had notice of the solicitor's lien before the attaching order was served.

In *Mercer v. Graves*, L. R. 7 Q. B. 499, which was an action on judgments recovered for costs, the defendant pleaded a set-off of judgments recovered against the plaintiff, and the plaintiff replied on equitable grounds that his solicitor had a lien on the judgments for his costs, and that the action was prosecuted for the solicitor's benefit. The Court held the replication bad, for the fact that an attorney had recovered a judgment for a client and that costs were due to the attorney, did not raise the relation of trustee and *cestui que trust* between the client and the attorney with respect to the proceeds of such judgment, the so-called lien of the attorney being only a claim to the protection of the Court as to his costs, when the equitable interference of the Court was asked for the purpose of setting off one judgment against another. In short, the defendant there had a right to plead his legal set-off in the action, and the Court could not interfere. The case nevertheless goes a long way in support of the attorney's right to have his lien protected in a case like the present. The cases of *Eisdell v. Coningham*, and *Sympson v. Prothero, supra*, were cited, and in referring to them Blackburn, J., said, "The garnishee cases are not analogous; it was in effect taking the matter out of the hands of the attorney, and it was but equitable that the amount of the attorney's costs should be secured to him before the money was paid over to the judgment creditor." And per Lush, J., "This is not an application to the Court to allow a cross-judgment to be set off against another, * * to allow which is dis-

cretionary with the Court, and is only granted on the terms that he who asks equity must do equity by first paying the attorney his costs. Nor is it an application under the garnishee clauses of the Common Law Procedure Act, which apply to the case of persons having liens upon debts, and may very properly extend to the case of an attorney having a lien for costs."

By the 23 & 24 Vict. ch. 127, sec. 28, Imp. Act, "The Attorneys' Act, 1860," an attorney was enabled to obtain a charging order for his costs of suit upon the property recovered or preserved through his instrumentality, and some of the cases to which I have been referred, depend upon the rights which the attorney had acquired under the Act. But there are others in which the Courts recognize the right of the attorney, independently of the Act, to be protected in his lien or charge upon the fund recovered by means of the suit, at all events where the attaching creditor or the garnishees had notice of the claim.

In *Hamer v. Giles*, L. R. 11 Ch. D. 942, it was held by Jessell, M. R., that the solicitors were entitled to their costs in priority to the claim of the creditor under the garnishee order, both under the Act and independently of it.

In *The Jeff Davis*, L.R. 2 Adm. & Ec., 1, Sir Robert Phillimore, held that a proctor's lien for his costs was not affected by a garnishee order, and that he was entitled to be paid his costs in priority to the claim of the garnishee. *Re Leader*, 2 Adm. & Ec. 314, is also strongly to the same effect.

Birchall v. Pugin, L. R. 10 C. P. 397, is the last case I shall cite. There the defendant having recovered a sum of money in an action brought by him against one Molloy, his attorney in that action took out a summons for a charging order under "The Attorneys' Act," charging his costs thereon. The summons had no effect as a charge upon the sum recovered. The plaintiff, Birchall, afterwards obtained an *ex parte* garnishee order attaching the sum recovered by the defendant against Molloy. Both parties then came

before the Judge in Chambers, the attorney claiming to have a charging order on the judgment debt as property recovered within the 28th sec. of the Attorneys' Act, and the attaching creditor claiming an order to pay over the sum attached. It was held, affirming the order of Brett, J., that the attorney was entitled to priority. The case recognizes the existence of an equity in the attorney apart from the statute. Lord Coleridge, C. J., says: "There is, it seems to me, strong authority against the contention of the plaintiff's counsel," and he then refers with approval to *Eisdell v. Coningham* and *Sympson v. Prothero*. Brett, J., says: "I think that even before the Act, in equity, money recovered by a decree was treated as property upon which an attorney would have an equitable lien. * * The judgments in the Admiralty cases, e.g., *The Jeff Davis*, though not absolutely binding, and also the decisions in equity are strong authorities to shew that when the attorney is the meritorious cause of the recovery of the sum in question, his claim upon it for costs is entitled to priority. *On the strength of that equity*, I thought B. (the attorney) was entitled to have his charge upon the money in preference to the execution creditor. Until the execution creditor's position is perfect (*i.e.*, by reason of having obtained an order to pay over the money garnished). I think the Court is bound to prefer the attorney, without whose services there would, by the hypothesis, have been no fund on which either party could have claimed."

It appears to me, from a consideration of these cases,

1. That as against an attaching creditor a Court of Law will protect an attorney's lien for costs of the action in which, or by means of which, the debt attached has been recovered.

2. That a Court of Equity will do so, and will also restrain a creditor who has obtained an attaching order at law from enforcing it against a fund recovered through the medium of a suit in equity, to the prejudice of the attorney's lien for costs in that suit.

3. That such lien extends only to the costs incurred in

the particular suit or proceeding, and not to the attorney's general costs against his client in other matters.

4. That it seems to be material only that the garnishee should have notice of the existence of the lien.

Even if the attorney's lien had hitherto been recognized in a Court of Equity only, I think that a Court of Law would now, under the Administration of Justice Act, and section 313 of the C. L. P. Act, which enables a Judge to deal with any claim of lien or charge upon the debt attached; be bound to give effect to the lien to the same extent that a Court of Equity would do.

In the case before me it is eminently just that the attorney's lien should be paid: all parties had notice of it, and it would be extremely inequitable that the judgment creditor, after lying by and allowing costs to be incurred in securing the debt, should come in and be paid the whole of it, to the exclusion of the attorney by whose exertions it has been recovered.

The order will therefore be to refer it to the Master to ascertain,

1. The costs of the attorney as between attorney and client of the Chancery suit and arbitration, and of this application.
 2. The amount paid by the attorney on taking up the award.
 3. Deduct these sums from the sum recovered.
 4. Pay the balance to the judgment creditor.
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IN RE SATO V. HUBBARD, UNION MUTUAL INSURANCE COMPANY GARNISHEES.

Attachment—Attorney—Affidavit—Garnishee, disputing liability—Prohibition.

The affidavit on which to obtain an attaching order may be made by the attorney of the judgment creditor, or by a partner of the attorney.

Sembly, that proceedings on such order could not be prohibited on the ground that it was founded on a defective affidavit, that being a mere matter of practice.

A debt is garnishable where it consists of money due under an award and decree of the Court of Chancery, although the full amount is not ascertained by reason of the costs not having been taxed. When the amount in such a case is finally ascertained, execution may be issued against the garnishee although he still disputes his liability, and the Judge is not bound to direct an issue.

[March 18, 1881.—*Osler, J.*]

This was a motion on behalf of the solicitors of the judgment debtor for a writ of prohibition, to restrain the Judge of the County Court of the County of York from further proceeding in the execution and enforcement of an order to attach a certain debt due by the insurance company to one Hubbard, the defendant, in a cause in the County Court of *Sato v. Hubbard*, on which debt the applicants claimed a lien for costs. The order in question was made on the 9th day of December, 1880, upon reading the affidavit of Mr. James Tilt, whose connection with the cause did not appear therein. It was served upon the solicitors of the garnishees, who were then indebted to the judgment debtor under an award and decree made in a suit in the Court of Chancery in the sum of \$414.95. By the decree the garnishees were ordered to pay this sum to the judgment debtor, together with his costs of suit subsequent to the hearing, and of the arbitration and award, after deducting therefrom their own costs up to and exclusive of the hearing. The costs had not been taxed or settled when the attaching order was served.

The summons to pay over the moneys so due by the garnishees in satisfaction of the judgment creditor's claim was returnable on the 14th of December, when the garnishees appeared by their attorney and disputed their

liability upon the ground that it was not known what amount, if any, would be found due from the garnishees to the judgment debtor, and that the amount in dispute was beyond the jurisdiction of the County Court. The summons was enlarged until the 17th of December. On the 16th of December, the garnishees attorneys were served with a notice, that without prejudice to their lien for costs on the proceeds of the suit, and in "furtherance of the lien and auxilary thereto," and for other purposes, the judgment debtor had assigned to his attorney all moneys in any way payable, due, or to become due to him from the garnishees.

On the return of the summons on the 17th of December, the objection was taken on behalf of the judgment debtor, Hubbard, that the attaching order had not been made upon the affidavit of the judgment creditor or that of his attorney, "but upon that of Mr. James Tilt, who did not appear to have any connection with their attorney, one James Crowther." Leave was given to file an additional affidavit shewing that Mr. Tilt was a partner of Mr. Crowther. The solicitors of the judgment debtor, who acted for him in the Chancery and arbitration proceedings, also appeared, and claimed that they had a lien for their costs incurred in the suit and proceedings, and they contended that if the summons was made absolute it should be so "subject to their rights under the said lien or otherwise." The summons was further enlarged until the taxation of the costs between the judgment debtor and the garnishees had been concluded, when it was found that a balance of \$627.43 was payable to the firm under the decree. Thereafter, on the 22nd of February, the learned Judge of the County Court "notwithstanding the said dispute of liability by the garnishees," made an order, after hearing all parties, for payment out of the debt in question of a sum sufficient to satisfy the judgment creditor's claims, and thereby, in the language of one of the affidavits, "decided that the lien of the solicitors for costs could be done away with by said garnishee proceedings." It was urged by the garnishees

that under the circumstances, and in view of the claim set up by the solicitors in respect of their lien, an issue should be directed so that the question should be transferred to the Referee in Chancery Chambers.

Alan Cassels, for the solicitors and judgment debtor.
Tilt, for the judgment creditors.

A. C. Galt, for the garnishees.

OSLER, J.—The objection to the jurisdiction of the learned Judge of the County Court to make the orders complained of was put on two grounds: 1. That the affidavit on which he acted was not the affidavit of the judgment creditor or that of his attorney, as required by R. S. O., ch. 50, sec. 307; and 2nd. That as the garnishees disputed their liability the Judge had no power to make an order upon them to pay over the debt, but was bound to direct an issue.

As to the first ground : The affidavit referred to by the statute is the affidavit of the judgment creditor or that of his attorney, but as the application is one from its nature which must be made after judgment, the affidavit, when made by an attorney, is not necessarily that of the attorney on the record. In the present case, as I understand it, Mr. James Crowther was the attorney on the record, and Mr. Tilt, by whom the affidavit in question was made, was his partner. The firm of the attorneys therefore were the attorneys of the judgment creditor. I find it laid down in *Pulling's Law of Attorneys*, p. 441, that all retainers by clients are deemed to be given to the firm, and not merely to any one partner. That being so, I take it that when it was shewn that Mr. Tilt was the partner of the judgment creditor's attorney, he was *ipso facto* himself shewn to be also the attorney or one of the attorneys of the judgment creditor, and so the statute was substantially, if not literally complied with. It is not necessary to decide whether the garnishee proceedings could be prohibited because they were founded on a defective affidavit. As at

present advised, I should hold it was a mere matter of practice, and such cases as *Martin qui tam v. Consolidated Bank*, 45 U. C. R. 163; *Tiffany v. Bullen*, 18 C. P. 91, are not applicable.

The second ground of objection does not touch the attaching order, for the debt was clearly in its nature garnishable, being money due under an award and decree of the Court of Chancery. The whole amount which would be ultimately payable to the judgment debtor thereunder was not finally ascertained when that order was made, only because the costs of suit, &c., had not been taxed and settled; but it was not the less a debt due and owing to the judgment debtor by the garnishees. Before the summons to pay over was made absolute these costs had been taxed, and the exact amount ascertained. The objection as stated in the affidavit of the attorney for the garnishees was, that it was not known what amount, if any, would be coming from the garnishees to the judgment debtor. This, if there was any doubt about it, would be a reason for directing an issue just as in any case where the garnishee does not admit the amount of his debt. But the exact amount of the debt having been fixed by taxation of the costs, pending an enlargement of the summons granted for the purpose of concluding the taxation, the only reason set up by the garnishees for disputing their liability was removed.

I do not discuss the further objection, which is said to have been made before the learned Judge, but which was not urged in the argument before me, viz., that the amount in dispute between the garnishees and judgment debtor was beyond the jurisdiction of the County Court. I do not see how the amount of the debt can be an element of jurisdiction in garnishee proceedings.

It is, however, urged by the judgment debtor and the solicitors, that as the garnishees in fact disputed their liability, or rather did not admit it, even after the amount of their debt was ascertained, but "suggested that the better course would be to direct an issue," the Judge had no

power to order execution to issue, and had no alternative but to direct the judgment creditor to proceed against the garnishees by writ, under the 310 sec. of the C. L. P. Act, R. S. O. ch. 50, whether there was substantial reason for disputing their liability or not. The case of the *Victoria Mutual Fire Ins. Co. v. Bethune*, 1 App. R. 398, was cited, and certain *dicta* which are to be found at pp. 414 and 420, were relied upon in support of this contention. They were not, however, at all necessary for the decision of the case, which was disposed of on wholly different grounds, and the case of *Newman v. Rook*, 4 C. B. N. S. 434, which was not referred to, is expressly in point against the garnishee. Williams, J., said: "I am of opinion that the meaning of the clause is, that instead of ordering execution to issue against the garnishee, the Judge may, in his discretion, if he thinks there is sound reason to believe that the garnishee has ground for disputing his liability, direct a writ to issue," and Per Willes, J., "As to whether it is sufficient for the garnishee to say that he disputes the debt to make it incumbent on the Judge to order a suit to issue, I should say that the mere assertion of the garnishee that he disputes the debt amounts to nothing. There is no substantial dispute till some real answer or defence is set up." See also *Wise v. Birkenshaw*, 29 L. J. N. S. Ex. 240; *Seymour v. Brecon*, Ib. 243; *Richardson v. Greaves*, 10 W. R. 45; *Spencer v. Conly*, 26 U. C. C. P. 274.

Here it appears that so soon as the costs were taxed there was no substantial ground for disputing the liability of the garnishees, and the only reasons given by them for disputing it was gone.

There remained only the question of the attorney's lien, and the assignment of the debt garnished. So far as the assignment is concerned it appears to have been made after the service of the attaching order, and could therefore have no effect against it. But in any case the Judge had jurisdiction to dispose of the question under section 313, which provides that if the garnishee suggests that the debt sought to be attached belongs to some third person,

or that some third person has a lien or charge upon it, the Judge may order such third person to appear before him, and state on oath the nature and particulars of his claim on the debt. Sub-sec. 2, the Judge may bar the claim of such third person, or make such order for the determination of the matter in dispute either by the trial of an issue or otherwise as he thinks fit, upon such terms in all cases with respect to lien or charge of such third person, and as to costs, as he the thinks just and reasonable. Formerly where it appeared that the debts sought to be attached had been assigned, or where an assignment real or pretended was set up, the Judge could not order execution to issue, and the judgment creditor was compelled, if he desired to contest the assignment, to proceed by writ against the garnishee: *Spencer v. Conly*, 26 C. P. 274, where the cases are collected. Since the decision of that case the law has been amended, and where the debt sought to be attached has been assigned, the Judge can determine the rights of the assignee or lien-holder under the section quoted, all parties having been brought before him. That is what has been done here. All objections to the jurisdiction of the learned Judge to make either of the orders complained of, in my opinion, fail.

The question whether the attorney's lien for costs should be satisfied out of the fund, in priority to the claim of the attaching creditor, was argued. That was a question for the learned Judge of the County Court to decide, but I may say, as the parties have desired an expression of my opinion, that for the reasons I have given in *The Canadian Bank of Commerce v. Crouch*, ante p. 437, I am of opinion that the attorney's lien for costs of suit, as between attorney and client in, the Chancery proceedings and the arbitration, should be first satisfied out of the fund which was recovered by that litigation, in priority to the claim of the attaching creditor.

MURCHISON V. CANADA FARMERS' INSURANCE COMPANY.

Declaration—Time, computation of—R. S. O. ch. 50, sec. 93.

A plaintiff must declare within one year after the service of the writ of summons, inclusive of the day of service.

[March 8, 1881.—Mr. Dalton, Q.C.]

The defendant obtained a summons, calling upon the plaintiff to shew cause why the declaration, notice to plead, copy and service thereof, or one or more of them, should not be set aside with costs, on the ground that the plaintiff had not declared within one year after the writ of summons was returnable. The affidavit filed in support of the application shewed that the writ of summons was served on or before the 24th of February, 1880, and that the declaration was served on the 24th of February, 1881.

G. P. Gordon, shewed cause :—

R. S. O. chap. 50, section 93, provides that “A plaintiff shall be deemed out of Court unless he declares within one year after the writ of summons is returnable.” The first day must be excluded. R. S. O. ch. 50, sec. 354, does not apply, as in section 93 it is expressed that the year limited shall be after the return day of the writ.

Holman, supported the summons :—

The return day of the writ was the day of service, *i.e.*, the 24th day of February, 1880. The plaintiff should have declared on the 23rd of February to have been within the time limited in the Statute. The rule as to the computation of time in a case like this is clearly provided in R. S. O. ch. 50, sec. 354; *Hodgson v. Mee*, 3 A. E. 765, and *Conroy v. Pearson*, 4 P. R. 201. The rule is the same with regard to renewal of executions under the Common Law Procedure Act, where the wording is within “one year from the *teste*”: *Bank of Montreal v. Taylor*, 15 U. C. C. P. 107; *Scott v. Dickson*, 1 P. R. 366.

MR. DALTON, after reserving judgment, held that the year was inclusive of the 24th of February, 1880, and the plaintiff should have declared on the 23rd of February, 1881, to have been within the Statute. He said that R. S. O. ch. 50, sec. 354, was enacted for the purpose of avoiding such fine distinctions as were sought to be raised in this case. There could not be two 24th days of February in the one year.

Summons absolute, with costs.

REGINA V. MCHOLME.

Arrest—Habeas Corpus—Foreign offence, 6 & 7 Vic. ch. 34 Imp.

The prisoner was arrested in Toronto, upon information contained in a telegram from England, charging him with having committed a felony in that country, and stating that a warrant had been issued there for his arrest :

Held, that a person cannot under the Imperial Act 6 & 7 Vic. ch. 34, legally be arrested or detained here for an offence committed out of Canada, unless upon a warrant issued where the offence was committed, and endorsed by a Judge of a Superior Court in this country.

Such warrant must disclose a felony according to the law of this country, and *Semble*, that the expression “felony, to wit, larceny,” is insufficient. The prisoner was therefore discharged.

[March 20, 1881.—Cameron, J.]

On the seventh of March, 1881, a writ of *Habeas Corpus* was issued out of the Queen's Bench, directed to the keeper of the common goal of the County of York, commanding the said gaoler to have immediately before the Chief Justice of the Court of Queen's Bench, or of the Common Pleas, or any Judge of either of the said courts, the body of Robert McHolme, detained in the gaol of the said County of York, in his custody, together with the day and the cause of his being taken and detained, and the said writ, in order that there should be done thereupon what according to law shall seem fit to be done.

To this writ, John Green, keeper of the common gaol, made return on the eighth day of March 1881, and therefrom it appeared that the said Robert McHolme was held in custody under two several warrants of remand under the hand and seal of George Taylor Denison, Esquire, Police Magistrate of the City of Toronto, which warrants were returned therewith, and were as follows: (the usual caption being here omitted), "Whereas Robert McHolme was this day charged before the undersigned, George Taylor Denison, Esquire, Police Magistrate in and for the said City of Toronto, for that he the said Robert McHolme was, on the 25th day of February, in the year of our Lord one thousand eight hundred and eighty one, arrested on a telegram from Liverpool, England, charging him with conspiring to defraud, and it appears to me necessary to remand the said Robert McHolme. These are therefore to command you the said chief constable, or any othe police officers, or any of you, in Her Majesty's name, forthwith to convey the said Robert McHolme to the common gaol aforesaid, and there to deliver him to the keeper thereof, together with this precept; and I hereby command you, the said keeper, to receive the said Robert McHolme into your custody in the said common gaol, until the first day of March, in the year of our Lord 1881, when I hereby command you to have him at the Police Court, in the said City of Toronto at 10 o'clock in the forenoon of the said day, before me, * * to answer further to the said charge and to be further dealt with according to law, unless you shall be otherwise ordered in the meantime.

Given under my hand and seal this twenty sixth day of February, in the year of our Lord 1881."

The second warrant, omitting the formal parts, set out: "whereas Robert McHolme was this day charged before the undersigned, George Taylor Denison, Esquire, Police Magistrate, in and for the said City, for that he the said Robert McHolme on or about the month of January, in the year of our Lord one thousand eight hundred and eighty one, at Ormskirk, in that part of the United King-

dom of Great Britain and Ireland called England, did commit a certain felony, to wit, larceny, and immediately thereafter did abscond from England and come into Canada, to wit, to the City of Toronto, in the County of York, where he now is a fugitive from justice and in custody for the said felony, and that a warrant has been issued in England for the apprehension of the said Robert McHolme for the said felony, and that an officer of justice has been despatched from England with said warrant, to arrest the said Robert McHolme, and it appears to me to be necessary to remand the said Robert McHolme." The warrant then requires him to be detained by the keeper of the gaol until the tenth day of March, and then to have the said Robert McHolme before the said Police Magistrate, at the Police Court, at ten o'clock in the forenoon.

This warrant was dated the second day of March, 1881.

In aid of the writ of *habeas corpus* a writ of *certiorari* was also issued on the same day, directed to the Police Magistrate of the City of Toronto, requiring him to send to the Court of Queen's Bench all and singular the information, depositions, convictions, orders and proceedings had before him against the said Robert McHolme.

To this writ the Police Magistrate returned the information and depositions, together with certain telegrams and letters given in evidence before him. The information was as follows :

"The information and complaint of John Reid, of the City of Toronto, detective, taken on oath before me, George Taylor Denison, Esquire, Police Magistrate in and for the said City, the first day of March, in the year of our Lord one thousand eight hundred and eighty one. The informant upon his oath saith that he is informed and believes that Robert McHolme on or about the seventh day of January in the year of our Lord one thousand eight hundred and eighty one, at Ormskirk, in that part of the United Kingdom of Great Britain and Ireland called England, did commit a certain felony, and immediately thereafter did abscond from England and come to Canada, to wit, to

the City of Toronto, in the County of York, where he now is a fugitive from justice, a warrant having been issued in England for his apprehension for the felony aforesaid, and an officer having been despatched from England with said warrant to arrest him, as I am informed and believe.

(Signed) JOHN REID.

Sworn before me at Toronto, on the day first aforesaid.

(Signed) G. S. DENISON, P. M."

At the foot of the information was this note by the Police Magistrate. "1 March, 1881, Mr. Murphy, (counsel for McHolme) holds the information is bad, in that it discloses no offence with certainty, so that the accused can know of what he has (is) charge (?charged). Remanded till 2nd March, 1881, G. T. Denison, P. M."

On the second of March, the detective, Reid, laid a fresh information in the same words as the former, with the addition to the word "felony," of the words "to wit larceny." At the foot of this information was another note, "The defendant pleads not guilty. The following depositions and evidence were taken :

Frank C. Draper sworn, stated, "I am Chief Constable of the City of Toronto. The prisoner has been arrested in consequence of a letter from the Chief Constable of Montreal, now produced, marked A. I telegraphed the fact of the arrest to the Chief of Police, Montreal. I received a message from the Chief Constable, Montreal, produced, marked B. I afterwards received the telegram produced, marked D. I afterwards, on 26th February, cabled to Liverpool as follows: 'To Chief Constable, Liverpool, charge against McHolme, not felony here, therefore discharged next Tuesday. See Imperial Statute 6 & 7 Vic., chap. 64, sec. 10.' On the 28th February I received the cable message produced, marked F. On the same day I cabled Liverpool as follows: 'State exactly particular felony,' to which I received the message produced, marked F. I replied the same day, 1 March. This morning I received the message produced, marked G. There having been one arrest, no warrant has been issued here."

The telegrams in their order were as follows :

1. From the Chief of Police Montreal, 26th Feb. 1881.
"Hold McHolme. Have telegraphed to Liverpool. Will forward instructions to-morrow.

2. From the same, 26 Feb. 1881.

"Cable message from Liverpool. Detain McHolme. Secure money, books, and luggage. Officer by Wednesday's steamer. Warrant, conspiring to defraud creditors."

3. From Liverpool, 28th February 1881.

"Officer brings second warrant. Felony. Keep McHolme in custody."

4. From Liverpool. March 1881.

"Offences numerous. Two warrants. Perjury and stealing. Reply to-day."

5. From Liverpool, 2nd March, 1881.

"Thanks. Crowd (?Crown) Prosecutors. Officer to-morrow, via Halifax."

John Reid sworn, stated, "I arrested the prisoner at Trimble's office on Colborne Street, on the 25th February, 1881. I told him I wanted him on a telegram from Liverpool. He asked what for. I told him I did not know : there was a warrant out for him. He gave me the name of McComb, I thought. He said he left Scotland by the name of Fergusson. He said he thought they wanted to implicate him with his brother. He had two tin cases, a wooden box, two or three travelling bags, a couple of valises, and a violin case. He agrees with the description of him. I examined his luggage, and found papers having the name of McHolme."

This, with the description of the accused, from the Chief of Police of Montreal, was the whole evidence, documentary and otherwise.

Murphy, appeared for the prisoner on the return of the writ.

Fenton, shewed cause.

CAMERON, J.—It clearly appears from the information, depositions, and telegrams in evidence, that no offence is

charged against the accused as having been committed in the Province of Ontario, and therefore none that the Police Magistrate has jurisdiction over or the right to enquire into, unless there is some special Statute or Act of Parliament allowing him so to do; as by the law of England, which governs us in Ontario, a criminal act can only be investigated in the country where committed. Willes, J., in Keighley v. Bell, 4 F. & F. 790, thus states the law: "It is the general rule and principle of law that crime is local in its trial, and that offences are to be tried where they are alleged to have been committed, a principle of universal application." And in the present case the only authority I have been referred to by Mr Fenton as empowering the Police Magistrate to act, is the Imperial Act 6 & 7 Vic. chap. 34, the provisions of which, necessary to be considered in relation to the case, are contained in sections 2, 3, 4, 9, and 10, which are as follows:—

By section 2 it is enacted, "To remedy the failure of justice, by the escape of parties charged with having committed offences, into those portions of Her Majesty's Dominions which do not form part of the United Kingdom, that from and after the passing of this Act, if any person charged with having committed any offence such as hereinafter mentioned in any part of Her Majesty's Dominions, whether or not within the said United Kingdom, *and against whom a warrant shall be issued* by any person or persons having lawful authority to issue the same, shall be in any other part of Her Majesty's Dominions, not forming part of the said United Kingdom, it shall be lawful for the Chief Justice or any other Judge of Her Majesty's Superior Courts of Law, within that other part of Her Majesty's Dominions, where such person shall be, to endorse his name on such warrant, which *warrant so endorsed* shall be a sufficient authority to the person or persons to whom such warrant was originally directed, and also to all peace officers of the place where the warrant shall be so endorsed, to execute the same within the jurisdiction of the person by whom it shall be so endorsed, by

apprehending the person against whom such warrant is directed and to convey him before a Magistrate, or the person having authority to examine and commit offenders for trial in that part of Her Majesty's Dominions."

Section 3. "It shall be lawful for any person duly authorized to examine and commit offenders for trial, before whom any such supposed offenders *shall be brought as aforesaid*, upon such evidence of criminality as would justify his committal, if the offence had been committed in that part of Her Majesty's Dominions, to commit such supposed offender to prison, there to remain until he can be sent back in manner hereinafter mentioned, to that part of Her Majesty's Dominions *in which he is charged with* having committed such offence, and immediately after the committal of such person, information thereof, in writing, under the hand of the committing Magistrate, accompanied by a copy of the said warrant, shall be given in Great Britain to one of her Majesty's principal Secretaries of State, and in Ireland to the Chief Secretary of the Lord Lieutenant, and in any other part of Her Majesty's Dominions to the Governor or acting Governor."

By section 4, the depositions upon which the original warrant was granted, certified under the hand of the person issuing such warrant, are made evidence.

By section 9 it is enacted, "That it shall not be lawful for any person *to endorse his name on any* such warrant for the purpose of authorizing the apprehension of any person under this Act, until it shall have been proved to him upon oath, or by affidavit, that the seal or signature upon the same, is the seal or signature of the person having lawful authority to issue such warrant, whose seal or signature the same purports to be."

Section 10 enacts, "It shall not be lawful for any person *to endorse* his name upon such warrant for the purpose of authorizing the apprehension of any person under this Act unless it shall appear upon the face of the said warrant that the offence for which the person for whose apprehension the said warrant has been issued, is charged

to have committed, *is such* that if committed within that part of Her Majesty's Dominions where the warrant is so endorsed, it would *have amounted in law to a treason or some felony*, or unless the depositions appear sufficient to warrant the committal of such person for trial."

Under these provisions no Justice of the Peace in this country is warranted in entertaining or hearing any complaint for an offence committed without the Dominion of Canada, until the accused has been arrested in this country, under a warrant issued against him in the place where the offence to be enquired into was committed, and endorsed by the Chief Justice or some other Judge of a Superior Court in the country. It is the warrant, and arrest under it, so authorized, that give jurisdiction to the Magistrate to enquire, and not the commission of the offence *per se*, charged before him in the way offences committed in this country are charged. This statute differs in its terms from the Act 31 Vict. chap. 94, D., relating to the extradition of criminals for offences committed in the United States, under which Wilson, C. J., in *re Caldwell*, 5 P. R. 217, held the proceedings might be originated in this country. In his judgment on page 218 he said "The Statute of the Dominion 31 Vict. chap. 94, reciting the treaty, refers to persons who being charged with the crime of murder, &c., within the jurisdiction of the high contracting parties, seek an asylum, or should be found within the territories of the other, provided that this only should be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed. The *charge* may therefore be made within the jurisdiction of either of the high contracting parties, in case the evidence of criminality, according to the laws of the place where the fugitive or person so *charged* should be found, would justify his apprehension and commitment for trial, if the crime or offence had been *there* committed." This language is very different from that used in 6 & 7 Vic. chap 34. It

would seem absurd that if the warrant issued in England were in this country, a Judge should be prohibited from endorsing it so as to authorize the arrest of the person against whom it is directed, until it should be proved by oath or affidavit to have been signed and sealed by the person purporting to have signed and sealed it, and although in direct terms it charged an offence that would be a felony in this country ; and yet that the Police Magistrate could, upon an information laid by a person who knows nothing of the facts, but merely states his belief from information that an offence has been committed by the accused, and that a warrant has been issued for his apprehension, cause the apprehension and imprisonment of the accused. To allow the accused to continue in prison until the warrant arrives, and is endorsed under the Act by a Judge assuming its existence and that it contains all the essentials required, would be to sanction this absurdity, and is what in the discharge of my duty under the writ of *habeas corpus* I consider I cannot properly do. The Imperial Parliament must not, in its regard for the rights of individuals and its desire to prevent them being unduly harassed, have its enactments and provisions designed to that end disregarded by the arbitrary exercise of power by any individual, though in such exercise of power he is actuated solely by the laudable desire to prevent crime, and punish those who may be guilty of committing it. The warrant of commitment shews no legal cause for detaining the accused, and the evidence, if it may properly be so designated, does not. He is therefore illegally deprived of his liberty, and must be set free.

I may, as aptly expressing what I take to be the rights of the accused, refer to the language of Gwynne, J., in *re Lewis*, 6 P. R. at page 237, "It is the right of the accused, which impartial justice and the letter and spirit of the law award to him, that the minutest form and technicalities with which the legislature hath surrounded this species of *ex parte* testimony, shall be strictly complied with. We have no right to deprive him of the protection which the non compliance with

any of these forms may afford to him : however heinous may be the offence with which he stands charged, he has a right to insist that only legal evidence shall be received against him." This language applied to this case shews that this accused has a right to insist that the only legal process by which he could be arrested and detained is the English warrant disclosing a felony according to the law of the country, and endorsed by a Chief Justice or Judge of a Superior Court.

I entertain a very strong opinion also that the information and warrant of remand of the 2nd March, 1881, do not with sufficient certainty disclose an offence amounting to felony according to the law of Canada. It may be larceny, and a felony, in England or Scotland, for a bankrupt to take or conceal his own goods from his creditors ; it would not be in this country ; and where the Statute, as the one under consideration does, requires the warrant to disclose a felony according to the law of this country, it is not enough in the warrant to use the general term " felony" limited by the general description " larceny." By the Larceny Act, stealing a dog is a larceny, but not a felony, and is punishable on summary conviction. I should be inclined to think therefore that adding to the term felony the term larceny, did not make the charge so as plainly to indicate that according to the law of Ontario a felony had been committed. I do not however base my decision upon this ground, but upon the ground that no one, in the absence of the English warrant, had a right to authorize the arrest or detention of the accused, and the proceedings taken against him are absolutely void.

NOTE.—After the discharge of McHolme, as above reported, a detective from Liverpool arrived in Toronto, with a warrant issued by a Justice of the Peace at Ormskirk, in England, charging McHolme with the larceny of six ledgers, several promissory notes, and \$800 in money, besides other property which was claimed by the trustee of his brother under the Debtors' Act. This warrant was endorsed by Osler, J., under Imp. Act 6 & 7 Vic. ch. 34, and McHolme was again arrested. An application for a *certiorari* in order to discharge him, made before Hagarty, C. J., was refused, and the prisoner was sent to England for trial.—REF.

REGINA V. ADAMS.

Interest—Pawnbroker—Certiorari.

A pawnbroker, under Consol. Stat. C. ch. 61, may legally charge any rate of interest that may be agreed upon between him and the pledgor. Where a defendant has been committed for trial, but afterwards admitted to bail and discharged from custody, a Superior Court of law has still power to remove the proceedings on *certiorari*, but in its discretion it will not do so where there is no reason to apprehend that he will not be fairly tried.

Remarks upon the law relating to pawnbrokers.

[March 29, 1881.—Cameron, J.]

This was an application in Chambers, for a writ of *certiorari*, to remove the information laid against the defendant, by one Frederick George Purssord, before George Taylor Denison, Esquire, Police Magistrate, for the City of Toronto, on the eighteenth day of January 1881, the commitment for trial of the defendant and his recognizance of bail. The information charged that George Adams, on the 17th of January, 1881, at the City of Toronto, in the County of York, who then and there used and exercised the trade and business of a pawnbroker, did unlawfully demand, and receive and take of and from the informant, on redeeming the pawn and pledge hereinafter mentioned, the sum of one dollar of lawful money of Canada, as, for, and by way of profit upon the sum of five dollars of like lawful money, the said sum of five dollars being theretofore, to wit, on the twenty second day of November, in the year of our Lord 1880, in the City aforesaid, lent and advanced by the said George Adams to the said informant, upon a certain pawn and pledge, that is to say, one silver watch and one gold chain with locket attached; such said pawn and pledge were redeemed by informant within the space of two months after the same had been so pawned and pledged as aforesaid, the said sum of one dollar so demanded, received and taken as aforesaid, being over eighty three cents more than at and after the rate of five-sixths of a cent for the loan of any sum not exceeding fifty cents, and so on in the same proportion for every sum of fifty cents up to twenty dollars, for any

time not exceeding one month, and being at the rate of five hundred per cent per annum greater profit than he the said George Adams was there and then entitled to and ought to demand, receive and take in full satisfaction for all interest due upon the said loan and charge for warehouse room of the said pawn and pledge, the said George Adams thereby then unlawfully and wilfully contravening the Statute in that behalf, entitled "An Act respecting pawnbrokers, and pawnbroking," and against the peace of our lady the Queen and her crown and dignity. Notice of the intended application for the writ of *certiorari* was duly given to the Police Magistrate.

J. E. Rose, in pursuance of such notice moved for the writ on behalf of the defendant. He contended that the information and commitment disclosed no offence triable by indictment or summarily by the Magistrate; that no penalty is fixed or imposed by the Pawnbrokers' Act for taking more than the prescribed fee; that a penalty only attaches, if at all, when the pawnbroker refuses to give up the pawn or pledge on tender of the proper amount; and that since the usury laws have been abolished there is no restriction as to the amount a pawnbroker may receive as interest on the loan of money, more than in the case of any other person.

Fenton, the County Crown Attorney, on behalf of the Police Magistrate, showed cause. While admitting it was a very doubtful question whether it was an offence against the Statute, he contended that as the defendant was not in custody, he was not entitled to the writ of *certiorari* to remove the proceedings, but if he was so entitled, the question of criminality was not so free from doubt as to warrant its being disposed of on a summary application to quash the proceedings, before the facts were fully elicited by a trial.

CAMERON, J.—The first Pawnbrokers' Act in this Province was passed in the year 1851, being chap. 82 of the Statute 14 & 15 Vict. This Act as consolidated in the

Consolidated Statutes of Canada, chap. 61 (*a*), by section 1, makes it necessary for "every person exercising the trade of a pawnbroker in this Province"—that is, the Province of Canada—"to take out a license under the hand of the Governor, to be issued by the Revenue Inspectors, and to renew the same annually." By section 2 if he neglects to take out or renew such license he should forfeit \$200 for every pledge taken without such license. Section 3 fixes the license fee. Section 6 defines who is a pawnbroker, that is to say, "Every person who receives or takes by way of pawn, pledge, or exchange, any goods for the repayment of money lent thereon, shall be deemed a pawnbroker." Section 7, "Every pawnbroker shall have a sign with his name, and the word 'Pawnbroker,' in large legible characters thereon placed over the door outside of the shop, or other place used by him for carrying on such business. By section 8, in case of neglect to have such sign, he shall forfeit \$40 for every shop or place made use of for one week without having the same so put up, to be recovered, with costs, before any two Justices of the Peace, and if not forthwith paid, the same may by warrant be levied by distress and sale of the offender's goods. By sections 10, 11, 12, 13, and 14, the rates the pawnbroker may take are defined. Sections 15 to 30 relate to the duties of the pawnbroker in respect to keeping books, exhibiting fees, and giving information in regard to goods pledged, &c. And section 31 reads : "In case within one year after any goods have been pawned or pledged for securing money lent, the pawnner, or other person on his behalf, tenders to the person who lent the money, the note or memorandum required to be given by this Act" (section 18), "and also the principal money borrowed and the profit according to the rates of this Act, and, the person who took the goods in pawn, neglects or refuses, without reasonable cause, to deliver back the goods so pawned, the pawnner may make oath thereof before a Justice of the district or county

where the offence has been committed, and such Justice shall cause such person to come before him, and shall examine on oath the parties themselves and such other credible persons as appear before him, touching the premises, and if tender of the note or memorandum, with the principal sum lent, and all profit thereon, is proved on oath to have been made within the time aforesaid, then on payment by the borrower of such principal money and the profit due thereon to the lender, and in case the lender refuses to accept thereof on tender before the Justice, such Justice shall thereupon, by order under his hand, direct the goods so pawned forthwith to be delivered to the pawnier, and if the lender neglects or refuses to deliver up or make satisfaction for the goods as such Justice orders, the Justice shall commit him to the common goal of the district or county where the offence was committed, until he delivers up the goods according to the order, or makes satisfaction for the value thereof, to the party entitled to the same."

There is no direct prohibition in the Act against charging greater rates of interest than those designated in section 10, and the facts laid in the information clearly do not bring the case within section 31. When the Pawnbrokers' Act was proposed, the Usury Laws were in force, and that Act must therefore be regarded as an enabling Act, in the interest of the poorer classes of the community, who might be greatly benefited by the power to pledge small articles for small loans, the trouble attending the making of which would not be compensated by the legal rate of interest then permitted, and the greater rate provided by the Act furnished an inducement for the use of capital in that way.

The first Act in England on the subject would appear to have been 1 Jac. I. chap. 21, and the next 25 Geo. 3, chap. 48. Neither of these Acts prohibited what the defendant has done in this case, and the latter was designed as a measure to raise revenue, requiring a license to be taken out and a fee paid therefor, and in express terms does not apply to persons lending money at the lawful

rate. The later legislation in England, being subsequent to the year 1792, is not in force in this country. The whole law is therefore contained in the Pawnbrokers' Act, and, as already stated, that does not prohibit what was done by the defendant. Mr. *Fenton*, however, contends that the Act abolishing the Usury Laws only permitted the taking of any rate of interest that might be agreed upon by persons or corporations, not restricted by some special Act or Law in force in reference to them; and as pawnbrokers were, by the Pawnbroker's Act, in express terms, authorized to take special rates in excess of the legal rate of interest, when the 16 Vic. chap. 80 was passed, (Con. Stat. C. chap. 58), they were by virtue of sections 8 and 9 of said chap. 58 expressly confined to the rates fixed by the Act relating to them. These sections do not, I think, apply to pawnbrokers, who are of the general public within section 3 of the Act, which provides "except as hereinafter provided, any person or persons may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which may be agreed upon," and not within the exceptions which have relation only to corporations, or companies, or associations of persons, not expressly authorized by law to lend or borrow money.

The next question is, has the defendant a right to have the proceedings against him removed by *certiorari*, not having been tried or convicted, and having been admitted to bail? It is discretionary with the Court or Judge to remove proceedings affecting the liberty of the subject, into the Court of Queen's Bench, and there is in law nothing to prevent the removal of an information and commitment for trial thereon, before a Justice of the Peace, into the Court when a proper case is made out. When the applicant is in custody on illegal commitment, he usually obtains relief by means of *habeas corpus*; but where he is only committed for trial and has been admitted to bail, while the power exists in the Court, by virtue of its superintendence of all subordinate, or inferior, or limited jurisdictions, it is not usual to remove the proceedings into

the Queen's Bench, except where from the very nature of the case it is necessary to resort to that Court to secure an effectual and legal trial. In the present case there appears no reason to apprehend that the defendant will not be relieved from the charge against him as effectively in the General Sessions of the Peace, should he ever be called on to answer, as in the Queen's Bench. I decline therefore to order the issue of the writ sought, and leave the case to take the ordinary course.

Though it is not the province of a Judge to suggest what laws should be enacted or abrogated, it may not be out of place, as the Usury Laws were modified in favour of the poorer or needier classes in the enactment of the law relating to pawnbrokers, to call attention to the fact, those classes would seem to require some protection from the exorbitant demands of those who carry on that trade or business by the imposing of restrictions upon pawnbrokers, so as to confine their exactions upon necessity within something like reasonable bounds.

WILLETT V. BROWN.

Capias—Arrest—Discharge of prisoner.

Where defendant was arrested on a *Ca. Re.* and it was doubtful whether the debt was actually due or not, the Court refused to discharge the defendant, although the Judge who granted the order for the writ would not have done so, if all the facts had been before him.

[April 12, 1881.—*Hagarty, C.J.*]

The defendant was arrested under a writ of *capias*, issued upon the ground that he was about to quit Ontario, with intent to defeat the plaintiff in the recovery of her claim. The action was brought upon a guarantee entered into by the defendant to secure the payment of an investment in the nature of a second mortgage given by a third party to the plaintiff. This instrument had been given by the defendant as the solicitor of the plaintiff. The guarantee contained a clause to the effect that the defendant was to have three years in which to collect the mortgage, and to pay it over as fast as he collected it. The property was sold under the first mortgage; but he collected a large amount upon the covenant, and paid it over. A year and eight months of the three years had elapsed when the defendant was arrested.

Aylesworth moved absolute a summons to discharge the defendant, on the ground that no debt was due, the whole three years not having elapsed; and on the further ground that he was not about to quit the country with intent to defraud.

R. G. Cox, shewed cause, and filed affidavits imputing fraud to the defendant.

HAGARTY, C. J.—I am authorized by my brother Cameron, who made the order to hold to bail, to state that if the agreement had been produced to him on the application he would not have made the order, as the existence of an overdue claim would have been too doubtful to warrant his directing an arrest.

I concur in that view, and we both think it a matter of great doubt whether the defendant is not entitled to the three years mentioned in the agreement for payment of this amount.

But we also think that the existence of this doubt should also prevent a setting aside of the arrest.

Speaking for myself, in this time of general appeals, I begin to feel great distrust of my own judgment in all questions of construction. When called on to pronounce judgment in the suit I would, of course, determine it to the best of my judgment, but in an (as it were) interlocutory proceeding of this character I think it better to let the cause proceed to judgment.

It requires a very clear and undoubted state of facts to warrant the exercise of the Court's jurisdiction in setting aside an arrest on the ground of there being no cause of action.

On the other branch of the case I have decided not to interfere. The case is one of a very peculiar character, as disclosed by the affidavits filed. The defendant has actually left the country, and on his own statement has left no property available to process. I think he has failed to establish a case in which I would be justified in discharging him. I have only his own statement to sustain his position. He has established the fact that there was no concealment whatever as to his intended departure, which was publicly announced and known. But the affidavits filed on the plaintiff's side, which I do not propose to discuss at length, convince me that I ought not to interfere. The relation between the plaintiff and defendant was that of solicitor and client, and there is no doubt but that she has suffered seriously therefrom.

I discharge the summons, but without costs, for the reason stated in the opening of this judgment.

CHANCERY CHAMBERS.

RE FRANKLIN.

Quieting Titles Act—Division Court bond—Release of by 36 Vic. c. 6, sec. 5, O.

All Division Court Bonds made before 1st July, 1869, are effectually released by 36 Vic., c. 6, sec. 5, O., as to liabilities incurred thereunder, both before and since that date.

[February 25, 1876.—*Blake, V.C.*]

A petition under the Quieting Titles Act.

Some former owners of the land in question appeared to have given some Division Court bonds before the 1st of July, 1869.

Upon the matter being submitted to BLAKE, V.C.

Held, that 36 Vic. ch. 6 sec. 5, O., effectually releases all Division Court bonds made before the 1st July, 1869, both as to liabilities incurred thereunder before and since that date.

RE PELTEN.

Quieting Titles Act—Tenant for life—Consent to petition.

Where a petitioner under {the Quieting Titles Act has only an estate in fee in remainder, the consent of the tenant for life must be obtained before the petition can be filed.

[September 7, 1876.—*Blake, V.C.*]

A petition under the Quieting Titles Act by a person having an estate in fee in remainder.

BLAKE, V.C.—The consent of the tenant for life to the proceedings to quiet the title must be first obtained before the petition can be filed.

RE MOORE.

Quieting Titles Act—Certificate of discharge—Disclaimer of mortgagees.

A certificate of discharge of mortgage is of no effect to revest the legal estate until registered. Where a certificate of discharge was lost before registration : *Held*, that the disclaimer of the mortgagees, who were trustees, and the consent of their solicitors was not sufficient to enable the Court to declare the petitioner entitled to the legal estate in fee simple.

[June 15, 1878.—*Proudfoot, V.C.*]

A petition under the Quieting Titles Act.

On the 1st September, 1867, the petitioner had executed a mortgage on the land in question to secure \$5,600. The mortgagees resided in England, and were trustees under a marriage settlement. The beneficiaries also resided in England.

On the 2nd September, 1877, the mortgage was paid off in full, the money having been paid to Messrs. Patterson & Beaty, the solicitors of the mortgagees.

Evidence was adduced shewing that a certificate of discharge had been executed by the trustees, who had received the mortgage money, but that the certificate had been lost and so not registered.

The trustees relinquished their trusteeship and new trustees were duly appointed, who, with the old trustees, disclaimed all right under the mortgage.

PROUDFOOT, V. C.—The disclaimer of trustees and the consent of their solicitors, is not sufficient to enable the Court to declare the petitioner entitled to the legal estate in fee simple. A reconveyance or discharge of the mortgage must be got from the new trustees, as a certificate of discharge is of no effect to revest the legal estate until registered.

RE GILCHRIST.

Quieting Titles Act—Decree of foreclosure—Day reserved to infants to shew cause.

Where there was no evidence to shew that infants had been served with a decree of foreclosure reserving to them a day to shew cause on attaining their majority, but it was shewn that they had been served with notice of proceedings under the Quieting Titles Act, proof of service of the decree was dispensed with.

[February 2, 1879.—*Blake, V.C.*]

A petition under the Quieting Titles Act.

A decree of foreclosure had been made in a suit of *Buckley v. Craig*. The final order of foreclosure bore date the 22nd August, 1862. The usual day for infants to shew cause had been reserved therein.

There was no evidence that the infants had been served with an office copy of the decree on attaining their majority, but they were served with a notice in this matter.

BLAKE, V. C.—Proof of service of the decree may be dispensed with.

RE DUNHAM.

Quieting Titles Act—Contestant—Certificate—Evidence.

A contestant under the Quieting Titles Act must file a petition in his own name before a certificate can issue in his favour, but he may use on such petition the evidence adduced on the petition in which he was contestant.

[January 24, 1881.—*Blake, V.C.*]

A petition under the Quieting Titles Act.

A contestant came in and proved himself as against the petitioner entitled to be tenant in fee in remainder in the lands in question, and pending the proceedings the person for whose life the petitioner was entitled to the land in ques-

tion died. Under the circumstances, the contestant applied for leave to carry on the proceedings with a view to declaring the contestant entitled in fee simple in possession.

BLAKE, V. C.—The contestant must file a petition in his own name before certificate can issue in his favour, but he may use on such petition the evidence adduced in this matter.

RE CUMMINGS.

Quieting Titles Act—Effect of conveyance by petitioner after petition filed—Registrars' abstracts.

Parties to whom land has been conveyed after the registration of the certificate of the filing of the petition, and pending the investigation of the title, must be substituted as petitioners.

Registrars' abstracts must be continued to the date of the certificate of title.

[February 12, 1875.—*Proudfoot, V.C.*]

This was a petition under the Quieting Titles Act.

After the registration of the certificate of the filing of the petition, and pending the investigation of the title, the petitioner conveyed the land to another person, taking back a mortgage of one-half of it to himself, and a mortgage of the other half was made to a third party.

PROUDFOOT, V.C. (after consultation with the other members of the Court).—*Held*, that the parties to whom the land had been conveyed must be substituted as petitioners, and that affidavits must be made by them under the Act, and sheriff's certificates obtained as to them.

And also, that in future Registrars' abstracts must be brought down to the date of the certificate of title before the latter can issue.

RE CALLAGHAN.

Quieting Titles Act—Misdescription in will—Misdescription in deed—Effect of.

Where a petitioner under the Quieting Titles Act claimed title as devisee of certain land, but the description of the land in the will was different to that of the land which he claimed : *Held*, that he might establish a title shewing a misdescription in the will.

But where a misdescription occurred in a deed : *Held*, that the petitioner had merely established an equity to have the deed reformed, and that under the Act the Court could not declare the title as though the deed had in fact been reformed.

[March 16, 1874.—*The Full Court.*]

This was a petition under the Quieting Titles Act. The petitioner claimed title to 74 acres of the south half of a lot. The lot contained 200 acres ; 50 acres, being the north half of the south half of the lot, he claimed as grantee of his father under a deed dated the 1st February, 1844, in which, however, the land granted was described as the north half of lot 13. The remaining twenty-four acres being the north part of the south half of the south half, he claimed as devisee of his father. The description of the land in the will was the north part of the south half of lot 13.

The question whether on his own showing the petitioner had such a title to the seventy-four acres claimed by him, or to any part thereof, as could be quieted under the Act, was argued before the full Court, by direction of Blake, V. C.

Boyd, Q. C., for the petitioner.

THE COURT *held* that the petitioner might establish a title to the twenty-four acres on shewing a misdescription in the will, because in that event the legal estate would pass to the devisee notwithstanding the misdescription.

It was *held* also, that unless the petitioner could make out a title to the fifty acres under the Statute of Limitations he must obtain a decree to reform the deed under which he claimed, before he could be declared the owner.

The Court was of opinion that the Quieting Titles Act only enabled the Court to declare a petitioner entitled

to such estate or interest in land as he might prove himself entitled to, and that when the petitioner merely establishes an equity to have a deed reformed, on proceedings under the Quieting Titles Act the Court could not declare the title as though the deed had in fact been reformed, however clearly the equity to have it reformed might be established by the petitioner.

If a suit were found necessary, the Court determined that the proceedings upon this petition might be suspended until the suit to reform the deed had terminated.

RE MORSE.

Quieting Titles Act—Vesting order—Entireties—Effect of joining of wife to bar dower—Registration of plan.

Where a petitioner under the Quieting Titles Act claimed title through a vesting order made upon a sale under a decree in an administration suit : *Held*, under *Gunn v. Doble*, 15 Gr. 665, that in the absence of proof to the contrary, the order should be assumed to be regular, and that it was unnecessary to give evidence shewing title.

Where a deed in a chain of title had been made to a husband and wife as joint tenants : *Held*, following *Shaver v. Hart*, 31 U. C. R. 603, that notwithstanding the terms of the deed the husband and wife took by entireties. And where the husband made a conveyance of the same land in the lifetime of his wife, she merely joining to bar her dower, and she predeceased her husband : *Held*, that the husband's deed conveyed the fee.

Where pending the investigation of the title, the petitioner laid out the land in village lots and registered a plan : *Held*, that the petition must be amended in accordance with the plan.

[September 3, 1875.—*Blake*, V.C.]

A petition under the Quieting Titles Act.

The petitioner claimed title through a vesting order made upon a sale under a decree in an administration suit.

1. The Referee of Titles required that evidence be adduced to shew that the plaintiff and defendants in the suit of *Levitt v. Wood*, who were heirs and heiresses-at-law of James Beachell, a former owner of the land in question, were alive at the time the vesting order was granted.

The propriety of this requisition was submitted to BLAKE, V. C., who held, under *Gunn v. Doble*, 15 Gr. 655, that in the absence of proof to the contrary, the order should be assumed to be regular, which it would not be if there had been an abatement in the suit at the time it was pronounced.

2. A deed in the chain of title had been made to a husband and wife as joint tenants.

Held, following *Shaver v. Hart*, 31 U. C. Q. B. 603, that notwithstanding the terms of the deed, they took by entireties.

3. The husband made a conveyance of the land in the lifetime of his wife, she merely joining to bar her dower—the wife predeceased the husband.

Held, that the husband's deed conveyed the fee.

4. After the petition had been filed, and pending the investigation, the petitioner laid out the land in village lots, and registered a plan.

Held, that the petition must be amended and registered in accordance with the registered plan, (See R. S. O. ch. 111, sec. 82, sub-sec. 2.)

RE RAYNERD.

Quieting Titles Act—Outstanding legal estate—Certificate.

Where the title of a petitioner under the Quieting Titles Act was established except as to an undivided one-fifth interest in the bare legal estate, which appeared to be outstanding in an infant: Held, such interest must be got in by the petitioner, or be declared in the certificate of title to be outstanding.

[September 20, 1875.—*Proudfoot, V.C.*]

A petition under the Quieting Titles Act.

Richard Young, a former owner of the land in question, had, by agreement in writing, contracted to sell it to his son Richard. The father subsequently devised by his will all his real and personal estate to his son Richard and four

other children, and died before executing a conveyance according to the agreement. After his death, his son Richard, the vendee, paid the balance of the purchase money to the executrix of his father and obtained from three of his brothers and co-devisees, a conveyance of their interest. The fourth brother died, leaving an infant heir.

PROUDFOOT, V. C.—The outstanding undivided one-fifth interest must be got in by the petitioner, either by conveyance or a vesting order under the Trustee Act, otherwise it must be declared to be outstanding in the certificate of title.

The petitioner subsequently made application under the Trustee Act, and obtained an order vesting in him the outstanding legal estate in the undivided one-fifth.

RE MORSE. II.

Quieting Titles Act—Registrar's abstract—Substitute for.

Where in a petition under the Quieting Titles Act, it was shewn that the registrations on the whole lot, of which the land in question formed a part, numbered over 560, and that it would take six months and cost \$100 to prepare an abstract :

Held, that the abstract might be dispensed with, if the affidavit of a Provincial Land Surveyor were filed, proving that he had examined all the registrations on the lot, and that only certain specified numbers affected the land in question.

[May 4, 1875.—*Blake, V.C.*]

A petition under the Quieting Titles Act.

An affidavit of the petitioner's solicitor was filed, stating that application had been made to the County Registrar for an abstract of title, and that the Registrar had replied that owing to the number of registrations on the property, it would take six months to prepare an abstract, which would cost \$100. A certificate from the Registrar was put in shewing that the registrations on the whole lot, of which the land in question formed a part, numbered over 560,

and that he could not give an abstract of the lands in question without including the registrations on the whole lot.

BLAKE, V. C.—The abstract might be dispensed with if an affidavit of a Provincial Land Surveyor were filed, proving that he had examined all the registrations on the lot, and that only certain specified numbers affected the land in question.

WADSWORTH v. BELL.

Sheriff—Poundage—Allowance in lieu of.

The poundage of a sheriff cannot be taken to cover more than the risk and responsibility cast upon him when he seizes, retains, and sells goods, and from this levy return the money. If the sheriff's action be intercepted, so that he does not make this money it is for the Court to say what allowance shall be made him in lieu of poundage.

[March 7th, 1881.—*Blake, V. C.*]

In this case writs of *fit. fa.*, goods and lands were placed in the hands of the sheriff of Wellington, on the 12th day of February, 1880, commanding him to levy \$2075.67 and sheriff's fees, &c., &c. The sheriff proceeded to the house of the defendant, and seized his goods; but receiving a satisfactory bond, he did not remain in possession. He advertised the goods for sale, however; and on the day of the sale proceeded to the premises to carry it out, but before selling, received instructions that the debt had been settled. The writ against goods was then withdrawn, the solicitor for the defendant undertaking to pay the sheriff his charges.

On the 13th September, 1880, an *alias* writ against goods, commanding him to levy the same amount was placed in the hands of the said sheriff, and he again seized and again took a bond for the goods, and advertised a sale, but, upon the day of the sale, when upon his way to

the premises, he again received notice that the debt was settled ; both writs were withdrawn, and the debt was paid out of moneys raised by mortgage on the defendant's real estate. In rendering his bill the sheriff claimed poundage on both the original and the *alias* writs, for the full amount under the tariff. The defendant thereupon applied to a Judge in Chambers to reduce and limit the amount of poundage and fees to be claimed by the sheriff.

N. W. Hoyles, for the defendant (the applicant.)

H. Cassels, for the sheriff.

BLAKE, V. C.—In this case the sheriff claimed for poundage on the first seizure, \$48 ; on the second seizure, \$95.79 ; and for other fees and expenses, \$33.99, making in all \$177.78. The full amount of poundage that could be charged was \$57.30 in the one case, and \$46.44 in the other, or in all, \$103.74, which, added to the other fees, made \$137.73. Before the days of sale the sheriff was notified, and neither of the sales took place.

The claim for poundage is in respect of two distinct seizures effected at different times. The sheriff has been paid \$134 on the claim he has made, and this is an application to compel him to refund a portion of this amount. All other the fees and expenses being charged, the poundage cannot be taken to cover more than the risk and responsibility which is cast upon a sheriff when he seizes, retains possession of and sells the goods, and from this levy returns the money. If the action of the sheriff be intercepted so that he do not make the money, then it is left to the Court to say what allowance, if any, should be made to him. I have been surprised to see how small the allowances are that have been made to the sheriff where the process has been intercepted ; but I am bound to follow the conclusion arrived at in these cases, and, doing so, cannot allow more than \$20 for each seizure. The sheriff will therefore be entitled to \$40 and \$33.99, or \$73.99. He has been paid \$134, and must therefore refund \$60. Each party to pay his costs of the application.

RE MCCOLL—MCCOLL V. MCCOLL.

Administration suit—Commission in lieu of costs—G. O. 643.

Where in an administration suit property sold subject to a mortgage :
Held, that the commission in lieu of costs should be upon the amount realized by the sale—that is, upon the actual value of the interest of the intestate in the property in question, not upon the whole purchase money.

[March 21st, 1881.—*Blake, V. C.*]

The usual order for administration had been made by the Master in this matter. Upon the property in question there was a mortgage made by the intestate, which was not due ; and the mortgagee declined to consent to a sale free from the mortgage. The land was sold at auction for \$3,000 ; and, after making allowance for the mortgage, which the purchaser, under the conditions, assumed, the balance of purchase money, amounting to about \$1,700; was paid into Court.

In fixing the commission the Master allowed it only on the amount paid into Court.

On 21st of March, 1880, *H. Symons*, on motion for distribution, asked the Court for the construction of the words, “*A commission on the amount realized*,” in General Order 643, urging that the commission should be allowed on the whole amount of the purchase money, which was really the amount realized.

Plumb, for the infants.

BLAKE, V. C., held that the Master was right : that the amount realized was the balance of the purchase money, being the actual value of the estate or interest of the intestate in the land in question. Had the mortgagee consented to a sale free from his mortgage the amount realized would then have been \$3,000, and the commission would properly have been allowed upon that sum. The Court would, in that event, have adjudicated upon the whole amount, and made directions as to its disposition.

JONES v. DAWSON.

Administration suit—Tenant by courtesy.

A testator devised his property to trustees, in trust to pay the rents and profits to his wife durante viduitate, and if she married again she was to have an annuity, and the property was to be applied as directed for the benefit of the children and divide among them when the youngest came of age. One daughter married and died before the period of division, leaving a husband and two children. The testator's widow married again before the death of the daughter.

Held, that the husband of the daughter was tenant by the courtesy of her share.

[March 19, 1881.—*Proudfoot, V.C.*]

A motion for distribution under a Master's report in an Administration suit.

Watson, for the plaintiff.

Plumb, for the infants.

PROUDFOOT, V. C.—The testator gave to his children all his real and personal property, to be divided equally when the youngest came to the age of twenty-one, subject to the following provisions, &c.: To his wife all the rents and profits of lands and interest of money, to maintain herself and educate and maintain his children, as long as she remained his widow; but if she married again she was to have £25 per annum, and the moneys, rents, &c., were to be applied for the benefit of his children and the property was to be divided among them when the youngest came of age.

The testator left several children, the youngest of whom came of age in 1879. One of the children, a daughter, Elizabeth, married the defendant, Alexander Wright, in 1870, and died in 1875, leaving her husband and two sons surviving her. The widow, it is admitted, married again before the death of the daughter.

The Master has found Alexander Wright entitled to courtesy, which is now questioned on behalf of his children, counsel contend that the possession of the mother to the time of her death was not such an estate in possession

(assuming the possession of the executor to be that of the beneficiaries,) as that under the old law of descent descent could have been traced from her as the person last actually seised, because the will defined the interest the children were to take, viz., an estate in remainder expectant upon the freehold estate of the widow for life or widowhood, and one which even if she married again or died, was postponed from becoming an estate in possession until the youngest child should come of age : *Co. Lit.* sec. 32, 51 ; *DeGrey v.. Richardsan*, 3 Atk. 469.

In this case the freehold estate of the testator's widow ended before the death of the daughter, which puts an end to the difficulty as to the wife's estate being a remainder expectant upon an estate of freehold ; for that only precludes the tenancy by the courtesy, if it is not determined during the coverture : *Co. Lit.* sec. 35.

It seems there must still be seisin in deed of the wife, when it is attainable, in order to entitle the husband to be tenant by the courtesy. But in *Weaver v. Burgess*, 22 U.C. C. P. 104, it was held that a grant from the Crown conferred such a seisin on the wife as to entitle the husband to the courtesy. And when the wife takes land by devise, though she be an heiress of the devisee, she takes by purchase, and thus becomes a stock from which descent may be traced.

The reference to section 32 *Co. Lit.* states that this issue must be such as may by possibility inherit as heir to the wife. This is clearly explained by Gwynne, J., in *Weaver v. Burgess, supra*, p. 110. That the issue could not claim as heir to the wife where the property had descended to her, because descent had to be proved from the purchaser, unless there had been an actual seisin during coverture. But where the wife was purchaser then the issue could inherit as her heir, and then no actual seisin was needed, and her issue would inherit whether she made an actual entry or not.

A devise passes an estate as effectually as by feoffment, and livery of seisin. It requires no aid from, and does not

operate under, the Statute of Uses. And the seisin under it I consider to be as potent as under the grant from the Crown in *Weaver v. Burgess, supra*: *Seaton v. Lunney*, 27 Gr. 174.

The wife could not get possession until the termination of the chattel interest, in the trustees; and therefore the case seems expressly within the language of *Co. Lit.* sec. 35, that seisin in law will suffice if actual seisin is unattainable.

I think, therefore, the Master was right in finding the husband entitled to be tenant by the courtesy.

SINGER ET AL. V. C. W. WILLIAMS MANUFACTURING
COMPANY.

Foreign commission—What must be shown on application for.

On an application for a foreign commission to examine a witness who is travelling, it should be shown that he will remain at the place to which the commission is directed a sufficient time to allow of its due execution.

[March 1st, 1881.—*Blake, V.C.*]

This was an application to the Referee in Chambers, on behalf of the plaintiffs, for an order for a commission to San Francisco to examine a witness. The affidavit, which was made by the solicitor for the plaintiffs, in addition to the usual clauses shewing that the witness was material and necessary, contained the following paragraphs:—

3. The permanent place of residence of the said George B. Woodruff (the witness,) is in London, England, but he has been travelling for some period, and I am informed and believe that he is now *en route* between Australia and

San Francisco, and that he will arrive at the said city of San Francisco, in the state of California, about the first of April next, and a commission directed to that place for his examination will enable the plaintiffs to procure his evidence at that time for the purpose of said hearing. (4) That I received the information as to the whereabouts of the said Woodruff by telegram last evening, and not before. (5) I am informed by the plaintiffs that they have just learned the particular route of the said witness in his travels, and that prior to this they were unable to state to what place a commission could be directed with any probability of reaching the said witness.

Watson, for the plaintiffs, submitted that upon the material produced he was entitled to an order for a commission : that the practice does not require an affidavit from a party to a suit : that the affidavit filed made a *prima facie* case : that it was not necessary to shew an absolute certainty that the commission would be executed ; that would be impracticable ; and here it was stated that the issue of the commission to San Francisco would enable the plaintiffs to procure the evidence of the witness : that the objection was founded only on the possibility of cost being uselessly incurred : that it was known that the plaintiffs were amply able to pay costs, and that the defendants might be protected by an order in respect to costs.

Hoyles, for the defendants, objected that the material in support of the motion was insufficient, as the means of knowledge were not shewn : that it did not appear that there was any certainty of the commission being executed, as the exact day of the arrival of the witness was not known, nor how long his stay would be in San Francisco : that it might be that he would merely pass through : that it would be unfair to the defendants to compel them to prepare cross-interrogatories, make preparations, instruct agents, &c., upon what might be merely a contingency, and without any certainty that the commission could be executed.

THE REFEREE allowed an affidavit to be filed shewing the means of knowledge, and made the order for a commission ; but directed that in the event of the non-execution of the commission, by reason of the absence or the non-attendance of the witness, or of the plaintiffs failing to prosecute the same, that the plaintiffs should at once pay the defendants the costs of and incidental to the application. The defendants appealed.

The appeal came on before Blake, V. C., on the 1st of March, 1881.

Hoyles, for the appellants.

Watson, for the plaintiffs.

BLAKE, V. C., held that the order had issued on insufficient material, as there was no certainty that it could be executed. He thought that where the witness to be examined was travelling there should be shewn to be a possibility of delay by him in the place to which the commission is directed sufficient to allow of his examination. He allowed the appeal to stand over, to enable the plaintiffs to procure an affidavit as to these facts.

An affidavit was subsequently produced, corroborating the statements made in the affidavits of the solicitor, shewing that the witness, although travelling for his health, had for many years been an officer in the employment of the plaintiffs ; and, in a letter received by the plaintiffs from the witness, it was stated that he intended to remain in or near San Francisco for a period of about two months.

BLAKE, V.C., then confirmed the order for a commission, and ordered the costs of the appeal to be costs in the cause.

GODERICH V. BRODIE.

Service of bill of complaint—Assignee in insolvency—Absconding defendant.

Where the defendant in a suit had absconded to the United States before the filing of the bill, and two months after the filing of the bill an assignee in insolvency was appointed by the creditors of the defendant, and the assignee was served with the bill, but not within the time limited by the General Orders. The Referee in Chambers made an order allowing the service as good, though made fourteen months after the bill was filed.

Held, on appeal, affirming the Referee's order, that the defendant having absconded was a sufficient reason for not proceeding with greater diligence.

[February 28, 1881.—*Blake, V.C.*]

In this case a bill was filed on the 24th day of October, 1879, by the plaintiffs against John Brodie, the owner of the property in question, and his assignees, to establish a mechanic's lien upon the property, and to gain priority for such lien to some extent over the mortgages. A certificate of *lis pendens* was issued on the same day, and registered against the plaintiff. On the 29th of November, 1879, a writ of attachment in insolvency was issued against the defendant John Brodie, and placed in the hands of John Haffner, an official assignee of the Court. Shortly before the bill was filed the defendant John Brodie had absconded to the United States. At the first meeting of the creditors, on the 24th of December, 1879, Haffner was constituted as assignee of the creditors. On the 7th of December, 1880, the suit was revived by making the assignee in insolvency a party defendant, and the bill of complaint and order of revivor were served upon him on the 13th of December, 1880. The plaintiffs then applied to the Referee in Chambers, and on the 22nd of December, 1880, obtained an order allowing the service effected upon the assignee as good service, although not effected within the time limited by the General Orders of the Court. The order was based upon the affidavit of the plaintiff's solicitor, stating that he was unaware until three weeks before the date of the application that Brodie had been put into insolvency, and an assignee appointed to his estate: that at once, upon learning that, he had revived

the suit, and served the bill on the assignee: that the defendant Brodie had absconded to the States before the bill was filed: that the defendants the mortgagees, in addition to their mortgage, had a mechanic's lien upon property for a large sum; and that the claims of the plaintiffs and the defendants the mortgagees amounted to far more than the whole value of the property: and that, therefore, neither the defendant Brodie nor his official assignee had any actual interest in the property: that the defendants the mortgagees held policies of insurance upon the property to a large amount, which were in litigation, and pending an appeal to the Supreme Court: that if the mortgagees recovered on the policies of insurance their mortgage debt would be almost entirely satisfied out of the insurance moneys: that negotiations had been entered into with the mortgagees by the plaintiffs, and proceedings had been stayed at their express request until the insurance suits were finally disposed of.

On the 21st day of January, 1881, an application was made by the defendant Haffner to discharge the order, allowing the service of the bill effected on him as good service, and to dismiss the bill against him for not having been served within the time limited by the General Orders. He shewed that he had been appointed creditors' assignee to the estate of Brodie on the 24th of December, 1879, and had always since resided at Guelph, where he could at any time have been served with the bill, and that he in no way evaded service of the bill. The mortgagees were never served with the bill, and on the same day applied for an order to dismiss the bill as against them for non-service. They shewed that they had always lived in Guelph up to quite recently, when one of them had removed to Kingston, and had in no way evaded service. They denied that any arrangement had been entered into with them by which they had caused proceedings to be stayed, and shewed that they were not aware until shortly before making the application that there was any suit pending to establish the plaintiff's lien, or that they were defendants to it.

THE REFEREE dismissed the bill as against the mortgagees, but refused to dismiss the bill as against the defendant Haffner, on the ground that he was bound by his previous exercise of discretion in granting an order *ex parte* allowing the service upon Haffner as good service.

On appeal from the Referee against the latter order,

H. Cassels, for the appeal.

T. Langton, contra.

BLAKE, V.C., held that the fact of the defendant Brodie having absconded to the United States was a sufficient reason for not proceeding with greater diligence, and refused to disturb the Referee's order, dismissing the appeal, with costs.

BIGGAR v. BIGGAR.

Partition—Master's office—Advertisement for creditors—Practice.

The fact that an intestate whose estate is being partitioned, has been dead for 45 years, does not warrant the Master in dispensing with the usual advertisement for creditors.

[March 28th, 1881.—*Blake, V. C.*]

Hodgins, Q. C., moved for an order for distribution, under the report in a partition suit. The Master had dispensed with the usual advertisement for creditors, and certified that he had done so because the intestate had been dead for forty-five years.

It was not shewn that any advertisement for creditors had ever at any time been made.

Plumb, for the infants, contended that the advertisement could not be dispensed with, and referred to the case of a bond given for a longer period than forty-five years or a judgment kept alive for that period, as instances of debts which would not be barred by the Statute of Limitations.

BLAKE, V. C.—Creditors must be advertised for. The order for distribution may go, if no creditors appear in answer to the advertisement.

LONDON AND CANADIAN LOAN AND AGENCY COMPANY V.
EVERITT.

Foreclosure—Infants—Day to shew cause.

A final order of foreclosure should reserve a day for infant defendants to shew cause.

SPRAGGE, C., was of opinion that the practice should be changed for the sake of putting an end to litigation, and to the evil of having estates tied up for perhaps many years, but refused to change the practice in the present case.

[February 15, 1881.—*Spragge, C.*]

The facts appear in the judgment.

Arnoldi, for plaintiff.

Plumb, for the infant defendants.

SPRAGGE, C.—The question is, whether infant defendants have a day to shew cause under the circumstances which exist in this case.

The bill is upon a legal mortgage of land, made by an executor in pursuance of the will of the then owner of the land. The infants by their answer questioned the validity of the mortgage, and appeared upon the hearing, the bill being taken *pro confesso* against the other defendants, and the decree directed special inquiries in respect of the sums wherewith the infants were chargeable.

The bill prayed a sale, and default having been made in payment of the amount found due, the Master proceeded to offer the premises for sale. The sale proved abortive; the highest bid being considerably less than the amount with which the infants are found chargeable by the report; and therefore the plaintiffs applied to the Referee in Chambers for a final order of foreclosure; and after this the question arises whether the final order should reserve to the defendants a day to shew cause upon coming of age.

The reasons upon which an infant defendant to a suit by a mortgagee has been held entitled to a day to shew

cause do not seem now to exist. Parol demurrer has been abolished ; and the Trustee Act of 1850' enables the Court to perfect the title of the mortgagee in the case of an equitable mortgage; as it would be without any conveyance in the case of a legal mortgage. Still the only exception to the giving of a day to shew cause in England, as well as here, has been, where there has been a decree for sale followed by a sale ; and in Ireland, where the decree is always for sale ; and in an exceptional case, which I will notice presently.

I do not see that a plaintiff coming for foreclosure is any the more entitled to it without giving a day to shew cause, because he has made an abortive attempt at a sale, than he would be in case he had made no such attempt; because the reason for dispensing with it exists only where there has been an actual sale.

The exceptional case is mentioned in *Seton*, 4th ed., 711, where the minutes of decree made by Page Wood, V. C., are given. The minutes run thus : and the plaintiff by his counsel offering to pay unto the defendants, S. & L., his wife, and G. the infant, their costs of this cause as between solicitor and client, upon an absolute decree of foreclosure being now made as against them ; and the defendant S. by his counsel disclaiming all interest in the estate comprised in the indenture of mortgage in the pleadings mentioned, dated, &c., and consenting to an absolute decree ; and counsel for the defendant L., the wife of the said S., and for the defendant G., the infant, not asking for liberty to redeem the mortgaged hereditaments, or for any account of what is due to the plaintiff, declare that it will be for the benefit of the defendants L., and of G., the infant, to accept the said offer ; and let the defendants S. and L. his wife, and G. the infant, from henceforth stand absolutely debarred and foreclosed, &c. And let the plaintiff B. pay unto the defendants, &c., respectively their costs of this cause to be taxed, &c."

In the case before me counsel appear for the infants, and do not admit that it is for their benefit that the order

should go, but insist that they are entitled to a day to shew cause.

As I gather from the text books, it is still the practice in England, though thirty years have elapsed since the passing of the Trustee Act, to give the infant a day to shew cause ; and counsel agree that it has always hitherto been the practice here.

Mr. Fisher, in his book on mortgages, sec. 1846, says, and I agree with him, "His (the infant's) whole right both legal and equitable can now be bound by the decree and order of the Court, and the right to the day to shew cause should cease, with the reason upon which it was founded." But he adds, "the practice of giving a day to shew cause is still followed."

I do not feel at liberty to change that which has been the practice both in England and in this country for so many years, but for the sake of putting an end to litigation, and to the evil of having estates tied up, it may be for many years, it would, in my opinion, be well that the Acts to which I have referred should be followed by their legitimate consequences, the abolition of the right to an infant to shew cause upon coming of age against a decree, or order, or judgment pronounced, in a suit in which he has been a party.

The plaintiffs must pay the costs of the solicitor representing the infants.

GOUGH V. PARK.

Costs—Solicitor and client—Travelling expenses—Special attendance in M. O.—G. O. 608.

Where costs as between solicitor and client were to be paid by the plaintiff to the defendant, and where it appeared that the defendant's solicitor had at the request of his client, made in good faith and on reasonable grounds, travelled from Sarnia to Toronto, to attend on the examination of the plaintiff on the bill:

Held, on appeal from the Master, that the defendant could tax against the plaintiff a sum of \$60, paid to defendant's solicitor for two days services and travelling expenses.

[20th January, 1881.—*Proudfoot, V.C.*]

The facts sufficiently appear in the judgment.

Hoyle, for appellant.

Foster, contra.

PROUDFOOT, V. C.—The decree was made by consent, the plaintiff agreeing to pay the defendant his costs of suit, to be taxed between solicitor and client.

The defendant resides in Port Huron, his solicitor in Sarnia. The bill was filed in Toronto, and it was thought advisable to examine the plaintiff on the bill, and the defendant was desirous of his solicitor attending personally to the examination, as he was fully conversant with the whole case, and familiar with many facts and circumstances that did not appear in the pleadings. The defendant paid his solicitor \$60, to cover his charges and expenses.

The Master has allowed only \$6 for a special attendance of three hours.

The time occupied by the solicitor in the journey and attendance seems to have been two days, and his expenses, \$15.50.

G. O. 608, makes the tariff applicable as well between solicitor and client, as between party and party. But I apprehend that the Master under the common order might have regard to any agreement that existed between the solicitor and client as

to the costs to be charged, as for instance that only costs out of pocket should be charged. *Morgan & Davey*, 313. And what the plaintiff here has to pay is what the attorney could recover from his client: *Re Geddes & Wilson*, 2 Ch. Chy. 447, establishes that the attorney cannot contract with his client for a recompence for services higher than specified in the tariff. And had the charge been for \$60 for three hours' attendance before the examiners it could not have been entertained. And the principle would not have been altered by the charge having been paid; although the client may be unable to recover it back. The plaintiff here is only to pay what the client could have been compelled to pay.

But where the client thinks it essential to his case to have the examination required to be in Toronto, made by his solicitor residing in Sarnia, who was thoroughly acquainted with the facts bearing upon it, and the solicitor undertakes the journey from Sarnia to Toronto, which with the return journey and time spent in examination would occupy two days, and specifies his charges for the service so required and receives the amount, it would be impossible in ordinary circumstances for the client to have this reduced in taxation. If it were to appear indeed that any influence had been used by the solicitor to excite the apprehensions of the client and to magnify the value of his services, and if the case were a simple one, it might then be proper to consider whether the charge were a fair and reasonable one, or not. But there is nothing of the kind here; the client is a keen, sharp, intelligent business man, prosecuting successfully, I understand, a banking business among men equally keen; a man not liable to be influenced in matters of the kind by what his solicitor might say. The case was one of considerable complexity, and the result might have been materially affected by an examination by one who was thoroughly conversant with the facts. I think then

that the client could not have taxed anything off this charge.

Had it appeared that the charge and the payment were made after the decree for the purpose of adding to the burden of the plaintiff, it would not have been allowed. But the payment was made when the service was performed, and before the result of the suit could have been known, and there is nothing to lead one to suppose it was made *mala fide*.

And if the reasonableness of the amount were to be considered I cannot say that the sum is excessive. There is no fee in the tariff for journeys of solicitors or counsel to attend an examination. But there is for similar services, as in case of a sale where a solicitor attends with the approval of the Master, and it occupies more than one day, the Master may allow to him, in addition to his travelling expenses, per diem, a sum not exceeding \$20. The distance of Sarnia from Toronto is such that the journey and return could not be accomplished in one day, and the expenses seem to have been \$15.50, which would make a total of \$55.50, and the client might well have agreed to pay \$4.50 more than that.

Re Snell, L. R. 5 Ch. D. 815, is a very good instance of the rule of the Court in regard to travelling charges by a solicitor, and of its limitations. The Master had allowed the charge, and the Court finding the solicitor entitled to charge something would not enter into the question of amount. Here the Master has allowed nothing for the time and travel, and it is a question of principle, not of amount only.

I allow the appeal, with costs.

SIMONTON v. GRAHAM.

Mortgage—Interest after maturity.

Where no rate of interest is fixed by a mortgage to be paid after maturity, the rate of interest mentioned in the mortgage is chargeable *prima facie*, but the person seeking to reduce it may shew that it is more than the ordinary value of money.

[April 11, 1881.—*Blake, V.C.*]

This was a suit for foreclosure.

The mortgage proviso for repayment was as follows : “Provided this mortgage to be void on payment of the principal sum of \$1,500, with interest at 10 per cent. per annum, as follows : in three years from the date hereof, with interest as aforesaid, payable half-yearly.”

On a reference directed to the Master, at Chatham, no evidence was offered on behalf of either the plaintiff or the subsequent encumbrancers, and he found the plaintiff entitled to interest at the rate of ten per cent., up to the time the mortgage matured, and assessed his damages at the rate of six per cent. afterwards.

This finding was appealed from, and the appeal came up on April 11th.

Hoyles, for appeal, contended that *prima facie* the rate of interest fixed by the contract governs, and that unless there is some evidence contra the Master should allow it. He cited *Cook v. Fowler*, L. R. 7 H. L. 27; *Re Roberts*, L. R. 14 Chy Div. 49.

E. Douglas Armour, contra. The contract provides for the rate of interest up to maturity. It does not provide for any rate thereafter, and therefore the statutory rate governs. The plaintiff offered no evidence, and so the Master could only allow the legal rate. If the statute do not govern, then the assessment was one made by the Master in his discretion, acting as a jury, and the Court should not disturb the finding of a fact, or interfere with

the discretion of the Master in assessing damages, because it is not shewn that the finding is against evidence or the weight of evidence. And at any rate, as the allowance is made as damages, those damages should not be charged upon the land as against a subsequent encumbrancer.

Hoyles, in reply. A subsequent encumbrancer is the assignee of the mortgagor, and stands in his position as to what is due on the first mortgage.

BLAKE, V. C., thought, that but for *Dalby v. Humphrey*, 37 U. C. R. 514, the statutory rate should govern in the absence of a stipulation between the parties, but that case appeared to follow *Cook v. Fowler*, L. R. 7 H. L. 27, and he therefore held that where no rate of interest is fixed by the mortgage for payment after maturity, interest thereafter being awarded as damages for breach of contract, *prima facie* the rate of interest stipulated for up to the time certain should be taken; but that would not be conclusive; that the onus then lay upon the person seeking to reduce the rate reserved to show that it was more than the ordinary value of the money. He referred the case back to the Master to take evidence as to such value. If the Master alters his former finding, costs to be paid by the respondent to the appellant; if he does not, costs to be paid by appellant to respondent forthwith after taxation thereof.

COMMON LAW CHAMBERS.

REGINA EX REL. GRANT V. COLEMAN.

REGINA EX REL. DWYRE V. LEWIS.

Municipal election—Quo warranto—County Judge—Mandamus.

A County Court Judge having directed the issue of writs of *quo warranto* to test the validity of a municipal election, afterwards set aside the writs on certain exceptions taken thereto for irregularity.

Held, that he had power to take this course, and that a Superior Court had no power to interfere with his decision.

[May, 1881.—*Hagarty, C.J.*]

In these cases the learned Judge of the County Court at Ottawa directed the issue of writs in the nature of *quo warranto*, to test the validity of the election of defendants as aldermen of the city of Ottawa. Before the expiration of the eight days after service, application was made to him by defendants, before appearance, to set aside all proceedings on certain exceptions taken. After full argument and a carefully prepared judgment he set aside all the proceedings in each case, with costs.

One of the writs was in the Queen's Bench, the other in the Common Pleas. They were both issued by the Deputy Clerk of the Crown in Ottawa, on the Judge's fiat, and were returnable before him.

Ogden, for relators, applied for a *mandamus* to compel the County Judge to proceed with the hearing of the cases.

Aylesworth, shewed cause.

HAGARTY, C. J.—It is now urged before me that the learned Judge had no jurisdiction to do as he did, and that he should be compelled by *mandamus* to proceed to determine the cases.

The Municipal Act, R. S. O. ch. 174, sec. 179, directs that the validity of the elections may be tried by a Judge of the Superior Courts of law or the senior or officiating Judge of the County Court where the elections took place.

Section 180. Within a named time the relator enters into a recognizance, &c., with sureties to be allowed as sufficient by the Judge on affidavit of justification, and the Judge shall direct the writ to issue.

Section 181. The Judge of the Superior Court before whom the writ is returnable may order the evidence to be taken before the Judge of the County Court, who shall return it to the Clerk of the Crown at Toronto.

Section 185. Writs are to be issued by the Clerk of the Process, or Deputy-Clerk of the Crown in the county in which the election took place, and shall be returnable before the Judge in Chambers of the proper Court at Toronto, or before the Judge of the County Court at a place named in the writ, &c.

Section 186 allows the Judge to allow substitutional service in certain cases.

Section 187. The Judge before whom the writ is made returnable, or is returned, may order the issue of a writ of summons at any stage of the proceedings to make the returning officer or deputy a party.

Section 188. The Judge before whom the writ is returned may allow any person entitled to be a relator to intervene and defend, and may grant time therefor.

Section 189. The Judge may hear and determine the validity of the election, may bring before him assessment rolls, lists of electors, &c., may frame issues and direct their trial by any Court he may name.

Section 190. If the election be judged invalid the Judge may remove the person elected and determine that another was elected, and may direct his admission or a new election.

Section 198. Costs, in cases not provided for by statute, to be in discretion of Judge.

Section 199. The decision of the Judge shall be final, and after judgment he shall return the writ and judgment, with all things had before him touching the same, into the Court from which the writ issued, there to remain of record as a judgment of the said Court; and he shall, as occasion may require, enforce such judgment by peremptory mandamus, and by execution for costs.

Section 200. The Judges of the Superior Courts may make rules settling forms of writs, and may regulate the practice respecting suing out, service, and execution of such writs and punishment for disobedience &c., and respecting the practice generally in hearing and determining the validity of elections and costs.

It was not suggested in the argument that any of such rules affected the questions before me. Probably, in consequence of the introduction of amendments without carrying them into every section of the election clauses, it remains the law that all these proceedings must be apparently instituted and carried to judgment in the Superior Courts. But from the commencement of a *quo warranto* proceeding before the County Judge, the issue of the writ is directed by that official, and everything connected with it—trial, judgment, and any necessary interlocutory proceedings—are all before him. His decision is to be final, and no provision whatever is made for any review of his proceedings, or any appeal from his decision; and the same wide powers as to annulling the election of one or of the whole body of councillors and the direction of new elections, costs, &c., are given equally to him and to the Superior Court Judge. The entire conduct of the case is left to him without appeal. After giving the jurisdiction to him with the Superior Court Judges, the subsequent sections speak generally of "the Judge" without distinguishing his Court. The writ may be made returnable, (sec. 181,) before a Superior Court Judge, and he may direct the evidence to be taken before the County Court Judge and returned to Toronto.

It appears to me very clearly that I have no power in any way to reverse the learned Judge's decision. If he had jurisdiction to do as he did, there is an end of the matter. If I hold that he had no jurisdiction to set aside these proceedings, I would have equally to hold that a Superior Court Judge had no such power. The statute seems to provide no means whatever by which the Superior Courts can intervene to hear any such matter. Then, it appears that the learned Judge set aside the relator's proceedings for irregularity and insufficiency, with costs. It could hardly be argued, if the writ had been returnable before a Superior Court Judge, that the latter could not entertain and dispose of a motion to set aside the relation and all proceedings thereon for manifest insufficiency, and condemn the relator in costs. If there be not such a power somewhere then some curious consequences might follow, and the most palpably erroneous and insufficient statements be sufficient to compel a trial and final decision by the Judge.

I am of opinion that the Judge vested with such conclusive powers of upholding or avoiding municipal elections, must be held necessarily to have also the power here exercised in setting aside proceedings for irregularity or manifest error. I have nothing whatever to do with the correctness or incorrectness of the Judge's decision. In saying so, however, I must not be understood as finding any fault with it.

I think he had jurisdiction to take this course, and I therefore discharge the summons in each case with costs (a).

(a) The above decision was confirmed on appeal to the full Court of Queen's Bench.

McCRACKEN V. CRESWICK.

Division Courts Act, 1880—Jurisdiction—Interest—Promissory note.

Plaintiff sued on a promissory note for \$73.14, payable with interest at seven per cent; the principal and interest together amounting to \$103.44. Held, that under the Division Courts Act, 1880, the amount of fixed legal damages in the nature of interest for non-payment of a promissory note need not be under the signature of defendant, and the above claim could therefore be recovered in a Division Court.

[May 14, 1881,—*Hagarty, C.J.*]

C. E. Hewson obtained a summons for a prohibition to the first Division Court of Simcoe, on the ground of want of jurisdiction.

The claim was on a promissory note for \$73.14, dated 1st April, 1875, payable in six weeks, with interest at 7 per cent. The principal and interest claimed in all amounted to \$103.44.

Plaintiff, at the trial, offered to abandon the excess of claim over \$100, which defendant opposed. The Judge gave judgment for the whole claim, allowing interest at the rate of 7 per cent., as mentioned in the note.

Holman showed cause, citing *Vogt v Boyle*, *ante* p. 249.

Perdue supported the summons. He contended that the Division Courts Act, 1880, sec. 2, does not give a Division Court jurisdiction to try a claim for over \$100, where the amount is partly ascertained by the signature of the defendant, and partly unliquidated in the nature of damages. The interest in the present case, being in excess of the statutory interest, after the maturity of the note is a claim in the nature of damages; *Dalby v. Humphrey*, 37 U. C. R. 514. The above section only gives jurisdiction where the amount or balance claimed does not exceed \$200, and the amount or original amount of the claim is ascertained by the signature of the defendant. It is clear that no jurisdiction is given where there is added to the original ascertained amount a further unliquidated claim, which brings the whole over \$100.

HAGARTY, C. J.—It was urged that as the amount was not ascertained by the signature of the defendant, there was no jurisdiction to claim or recover over \$100.

On the face of the claim as made, I cannot hold that any excess of jurisdiction necessarily appears. By the Act of 1880, the Court may entertain “all claims for the recovery of a debt or money demand, the amount or balance of which does not exceed \$200, and the amount or original amount of the claim is ascertained by the signature of the defendant, or of the person whom as executor or administrator the defendant represents.”

Under the former law this claim, extending beyond the then limit, \$100, would be apparently over the jurisdiction. Under the late Act I do not think that it is. It would be a matter of evidence whether the amount claimed for interest, and extending over the \$100, was or was not ascertained by signature. Then, at the trial, the learned Judge allowed interest to plaintiff at the rate named in the note and gave judgment for \$103.44.

This claim was certainly one literally within the late Act, of which the “amount or original amount” was ascertained by defendant’s signature, viz., the promissory note. The Judge or jury before whom the claim would be tried had the undoubted right under the existing law, and by the long settled practice of the Courts, to allow interest not necessarily at the rate named in the note from the time it matured, but at the ordinary six per cent. See *Dalby v. Humphrey*, 37 U. C. R. 514, and the case in the House of Lords there cited.

Our C. L. P. Act, R. S. O., ch. 50, sec. 266, says “interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it.” Sec. 267, “upon any debt or sum certain, payable by virtue of a written instrument at a certain time, the jury may allow interest to the plaintiff from the time when such debt or sum became payable.”

I cannot understand why the Judge could not allow the ordinary interest so long as the total was within his extended jurisdiction.

The cause of action—the note—was clearly ascertained by defendant's signature. When defendant signed it, we must consider that he did so subject to the payment of interest so long as it was overdue: in other words, he promises to pay a named sum, and so long as that sum remains unpaid the law declares the payee to be entitled to interest as a legal consequence.

It seems to me to be an unjustifiably narrow construction of the late Act to hold that the amount of the fixed legal penalty or damages for non-payment of a note must be equally under the defendant's signature as the note itself on which they are claimed.

I think I should be trying to defeat the evident intention of the Legislature if I adopt this view.

I think the plaintiff is entitled to say, "my cause of action is a note signed by defendant, not exceeding \$100, and the law and the practice allow me to claim interest thereon, as a legal consequence of non-payment, from the Judge or jury, and so long as the whole interest and principal do not exceed the \$200, the Court does not exceed its jurisdiction."

If defendant had made the note payable, as now, in six weeks, and adding "with interest thereon until finally paid," I see no reasonable doubt but that interest would be recoverable to any amount so as the whole did not exceed \$200. The claim would come within the words of the statute. In the present case the interest is recovered by law, usage, and practice, as legally as the principal is recoverable. I cannot see any practical distinction between the cases.

I think I am following both the spirit and letter of the law by holding this judgment to be within the jurisdiction of the Division Court.

Application must be refused, with costs.

IN RE DRINKWATER V. CLARRIDGE.

Division Court—Suit on note—Production of the note.

In a suit in a Division Court upon a negotiable instrument, where the summons is specially endorsed, and defendant does not dispute the claim, the plaintiff is entitled to enter judgment for the amount claimed, without the production or filing of such instrument.

[May 20, 1881.—*Hagarty, C.J.]*

This was an application for a *mandamus* to compel a Division Court clerk to enter judgment for plaintiff.

The summons was served on defendant in the usual form. It was specially endorsed, setting out the claim to be on a promissory note, a copy of which was endorsed, made by defendant, to plaintiff or order. No notice was left with the clerk of the claim being disputed, or of any defence being intended. After the proper time had elapsed, the clerk was required by the plaintiff to sign judgment and issue execution against defendant. The clerk, acting as it was said under instruction from the learned Judge, refused to enter judgment unless the note sued on was first produced and filed in Court.

Perdue, for the Division Court clerk, shewed cause.
Stonehouse supported the summons.

HAGARTY, C. J.—Sec. 79 of the Division Courts Act, R. S. O. ch. 47, declares that in actions for any debt or money demand where the particulars of claim are, with reasonable certainty and detail, endorsed on or attached to the summons, and a copy of the summons and particulars, with a notice in the form prescribed by the general orders, annexed to or endorsed on the summons has been duly served, then unless the defendant within eight days, &c., after service, leave notice with the clerk, disputing the claim, &c., final judgment may be entered by the clerk on return of such summons, &c., &c., and execution may issue. Subsec. 2—

judgment shall not be entered until the summons and particulars with affidavit of due service have been filed.

It was not denied on the argument but that the plaintiff had done all to entitle him to have final judgment and execution. But it was urged that by the custom of that Court the plaintiff was required in the case of suit on a negotiable note to produce and file the notice. It was also conceded that if the claim was for goods sold, &c., and the particulars were endorsed with reasonable certainty, the plaintiff would be entitled to judgment without any proof as to the sale, quantity, or value, &c.

Certain reasons or arguments were submitted in shewing cause, to the effect that it is a wise and useful precaution to require production and filing of the note. I do not question the wisdom of the practice, nor do I question for a moment, nor doubt that it has arisen from a desire to prevent possible injustice in the case of negotiable instruments. All I have to deal with is a matter of strict right. Can the Division Court authorities limit the operation of this 79th section to cases in which the note sued on is produced and filed? I had occasion, in a case of *Oliver v. Fryer*, 7 P. R. 325, to consider a practice that had long prevailed in the County Court, requiring parties in actions on notes to produce and fyle the note on entering judgment, although it was not in issue nor called for in the course of the suit. It was there held that the Court could not require such production or filing, and mandamus was awarded. It seems to me that the principles there declared must equally govern the present case in a Division Court.

If the Court here can insist on the production and fylng of the note as a condition of obtaining judgment, it seems to me it can equally insist on proof of the sale and delivery of goods set out in the special endorsement. The Legislature in such cases leaves it to the person sued to dispute the note or the goods and to insist on proof of his liability. If he decline or omit to dispute liability he waives his defence, and admits the plaintiff's right to judgment. It seems to me very singular that *non obstante* the plain

language of the statute, he can be compelled in effect still to have to give evidence of his claim ; in the one case by producing the evidence of defendant's liability in the shape of the note ; in the other by proof of the sale or value of the goods, or production of any order given for them. If defendant's default in disputing the claim admits that he has made the note sued on, why must plaintiff be made to produce it ?

On the argument, it was not suggested that there is any rule affecting the question, made under the authority of the statute.

I think the plaintiff is entitled to a writ of *mandamus*.

IN RE OSLER v. THE TORONTO, GREY AND BRUCE
RAILWAY.

Railway bonds—Transfer—Registration—Mandamus—38 Vic., ch. 56.

O., being the holder of fourteen bonds of the railway company, issued on 1st May, 1876, payable on 1st January, 1881, with interest meanwhile half-yearly at 6 per cent. per annum, requested the secretary of the company to register the bonds under 38 Vic., ch. 56,O. This the secretary refused to do unless the intermediate transfers were produced and registered at the same time.

Held, that the secretary was bound to register the bonds without the production or registration of the transfers, and a summons for a *mandamus* was made absolute with costs.

[July 13, 1881.—*Wilson, C.J.*]

A summons was granted upon the 16th of June, 1881, calling upon the Railway Company and N. S. Taylor, the Secretary of the company, to shew cause why a writ of *mandamus* should not issue, at the request of the said applicant, to the company and to their said secretary, commanding them or some or one of them to enter and register forthwith, pursuant to the statutes and the by-laws of the company affecting the same, the fourteen bonds of, and made by the company, held by the applicant, numbered

from 2781 to 2786, both inclusive, from 3953 to 3958, both inclusive, and 4005 to 4006, and dated on the 1st of May, 1876, for the sum of £100 stg. each, payable to the bearer thereof on the 1st of January, 1881, with interest half yearly, at the rate of 6 per cent., payable half yearly on the first days of July and January in each year from the date thereof; and why they, or some, or one of them should not pay the costs of and incidental to the application, and the issuing, serving, and enforcing the said writ of *mandamus*; and why such further and other order should not be made in the premises as to the Judge might seem just, as to the issue of the said writ and the said costs.

The affidavits filed on the part of the applicants set forth that the applicant was the holder of fourteen bonds of the Toronto, Grey, and Bruce Railway Company, issued on the 1st May, 1876, payable on the 1st January, 1881, with interest meanwhile half yearly at 6 per cent. per annum, which bonds he had requested the secretary of the company to register under 38 Vic. ch. 56, O. This the secretary refused to do unless the intermediate transfers were produced and registered at the same time.

The following affidavit and papers were filed on behalf of the company. Mr. Taylor, the secretary of the company, said that when the applicant on the 14th of June produced the said bonds to him, the secretary, he, the applicant, asked him, the secretary, to register them: that on turning to the bond register, it was found that the bonds so numbered stood in the name of another person than the applicant: that the secretary asked him for the transfer from that person to himself, when he said it was unnecessary to furnish one, and he had not a transfer; he asked the bonds to be registered without a transfer: that the secretary said he would register bonds only upon transfers being produced from the original holders thereof, and shewing a title thereto in the person applying to register, and he had been advised by the solicitor of the company that such was the proper course: that it was an error of the applicant in stating that he, the secretary, said

he had been ordered by the company to refuse to register the bonds unless transfers were produced, as the fact was he said he had obtained his instructions from the solicitor. That by the resolution of the directors of the company instructing the secretary to publish the advertisement—a copy of which was attached, marked A, he was expressly required to place at the foot of it a copy of the 38 Vic. ch. 56, sec. 13.

S. H. Blake, Q. C., shewed cause. He contended that as the bonds in question stood in the register book of the company in the names of other persons than the applicant, he was not entitled to have his name entered in the register as the holder of the bonds, although they are payable to bearer and are transferable by delivery, and he was the bearer of them. The bonds were issued under the 38 Vic. ch. 56; and it will be contended on the other side there is a particular construction which may be and which ought to be put upon the 13th section of that Act, which does not require the bonds to be registered, and which makes an alteration in that respect from what the law formerly was.

It will be necessary, therefore, to refer to the other Acts to see what the legislation has been with respect to the registration of these and the like bonds, in order to place the proper construction on section 13 of the 38 Vic. ch. 56.

The 31 Vic. ch. 40, incorporating this company, by section 21, gave power to the company to issue bonds; and it provided that if the interest upon them remained unpaid, "at the next ensuing general annual meeting of the company, all holders of bonds shall have and possess the same rights and privileges and qualifications for directors and for voting as are attached to shareholders, provided that the bonds and any transfers thereof shall have been first registered in the same manner as is provided for the registration of shares;" and by section 22, "All such bonds, debentures, mortgages, and other securi-

ties and coupons, and interest warrants thereon respectively, may be made payable to bearer and transferable by delivery, and any holder of any such, so made payable to bearer, may sue at law thereon in his own name." He referred also to R. S. O. ch. 165, secs 29 and 30, "Railway Act of Ontario," which, although applicable to shares only, was nevertheless applicable to the bonds in question when the holders of them claimed the rights of shareholders; and by these sections the transfer must be in writing in duplicate, one of which writings must be delivered to the company and entered in a book kept for that purpose. Then looking at the particular section in question, section 13 of the 38 Vic. ch. 56 provides, similar in its general terms to the proviso of the 31 Vic. ch. 40, sec. 21, that, "In the event at any time of the interest upon the loan capital remaining unpaid and owing, whether the same be held in bonds or debenture stock, then at the next general annual or special meeting of the company, all holders of bonds or debenture stock shall have and possess the same rights and privileges, and qualifications for directors, and for voting, as are attached to ordinary shareholders. Provided that the bonds, debenture stock, and any transfers thereof, shall have been first registered in the same manner as is provided for the registration of ordinary shares."

The question turns upon whether the words, *and any transfers thereof*, following immediately the "bonds, debenture stock," are limited to the debenture stock alone, or to the *bonds* as well as the debenture stock.

The 31 Vic. before referred to, shews conclusively that by that Act the *bonds* were expressly required to be registered; and there is no reason why the Legislature, in re-enacting in effect that proviso, should have altered its express declaration that bonds should be registered and their transfers, merely because the later Act declared that debenture stock and all transfers of it should be registered, because that means "*shall also be registered.*"

The act of conferring upon the bondholder the privileges of a *shareholder* is a strong reason why his bonds and their transfers should be registered as well as the shares, and their transfer, of an ordinary stockholder.

He referred to *Godfroy & Shortit's Companies Clauses Consolidation Act*, 8 & 9 Vic. ch. 16, and to secs. 45 to 49 of that Act, at pp. 12, 15, 50, and to *Kiely v. Smith*, 27 Grant 220.

McCarthy, Q. C., and *E. Martin*, Q. C., contra. The statutes have been fully referred to. These bonds were issued under the 38 Vic. ch. 56. No debenture stock was ever issued by the company.

The bonds are expressly made transferable by delivery, and they are authorized to be made payable to bearer, and these bonds are so made. They are marketable securities and pass from hand to hand without formal transfer. The very fact that the bonds of the company issued under the 31 Vic., and their transfers were required to be registered for the purpose of voting upon them, is a reason why the like construction should not be placed upon the 38 Vic.; when the latter proviso has been altered, and full effect can be given to the words, "and any transfers thereof," by confining them to the *debenture stock*, a new species of security introduced into this Act, and to which the words, "any transfers thereof," are peculiarly applicable, because such debenture stock must be issued in the name of particular persons, and a register of their names must be preserved.

It is sufficient if the holder of the bonds registers when he claims to vote, and to register the bonds only as being the holder and bearer of them. He cannot register any written transfer, for there is no such thing. If there be a written transfer in fact, it may have to be registered, but it can be in that case only, and that is not the kind of vote which the applicant has. They referred to *Norris, Administrator v. The Irish Land Co.*, 8 E. & B. 512.

WILSON, C. J.—It is singular the 31 Vic. ch. 40, sec. 21, did expressly require that the holders of bonds of the company should register them, “and any transfers thereof,” to entitle the holders to vote upon such bonds as shareholders, “in the same manner as is provided for the registration of shares;” because the shares were all duly registered and could only be transferred by writing in duplicate, one of which was to be delivered to the directors, and to be entered in a book of the company kept for that purpose; and the form of transfer to be executed is given by the statute; that is, stock was transferable by writing only, and that writing had to be recorded in the books of the company, while the *bonds* which the company issued were payable to bearer, and were transferable by delivery only.

The holder of such a bond could, therefore, sue the company upon it in his own name, and recover judgment, and issue execution as the holder of it, and as the person who alone had the actual and absolute title to it. And yet when he claimed to vote upon it the company could forbid him from doing so, because he, their judgment creditor upon such bond, whose title was established by matter of record, perhaps even by the express admission on record of his title, was not by entry in their books by a series of written transfers from the original holder, shown to be the holder and person entitled to the bond.

I have no doubt that such a provision as to registration of the bonds *and their transfers* being first made to entitle the holder to vote upon them, was inadvertently applied by the 31 Vic., to bonds payable to bearer and transferable by delivery only.

The effect of that enactment was, to prevent their circulation and transfer, and greatly to impede the welfare of the company as well as to embarrass the purchasers of these securities.

In the Imperial Act, 8 & 9 Vic. ch. 16, sec. 45, the bonds are made payable to a particular person, and his name and addition had to be entered in a register of the company; and by sec. 46, such person can only transfer that bond by

deed ; and by sec. 47, the transfer has to be registered with the company within a specified number of days after transfer.

I have no doubt the proviso in 31 Vic. was copied from some such Act without thinking of the difference in form and substance of an instrument described as it is in the English Act, and of its mode of transfer, and of such an instrument as is described in this company's Act, and of its transfer by mere manual delivery.

In order to give full effect to the intent of the 38 Vic., and to these bonds which were issued under it, I should not hold that their transfer must be by writing, when the Act says it shall be by delivery ; and I should not hold that the words in section 13 of that Act, "and any transfers thereof," apply to instruments passing in circulation from hand to hand, as much so as a bank note by delivery, unless I am obliged to do so by the imperative words of the statute.

Upon looking at that Act, ch. 56, the first section provides the loan capital shall consist of "debenture stock" and "terminable bonds." Section 3 provides that the bonds may be issued as payable to bearer ; and that they shall be transferable by delivery, and the holder may sue in his own name.

Section 4 provides that the debenture stock shall be entered by the company "in a register to be kept for the purpose wherein they shall enter the names and addresses of the several persons entitled to debenture stock."

Section 5 provides that the company shall deliver to the holder of such debenture stock, a certificate stating the amount of it.

Section 11 provides that "all transfers of debenture stock shall be registered at the office of the company in Toronto," but the transfers may be left at any place in Great Britain, which the company may indicate, for the purpose of being transmitted to the office in Toronto.

Then follows section 13, upon which the case rests ; and it provides as before stated, that when interest is

unpaid on bonds or debenture stock, the holders of them shall possess the rights and qualifications of directors and for voting as attached to ordinary shareholders: "Provided that the bonds, debenture stock, and any transfer thereof shall have been first registered in the same manner as is provided for the registration of ordinary shares."

This Act in very plain terms draws the distinction between bonds and debenture stock. The bonds shall be payable to bearer, and be transferable by delivery. The debenture stock shall be payable to a particular person, and his name and address shall be registered; and every transfer by the holder of debenture stock shall be registered; but nothing about the name of any body being registered in the case of bonds, nor of any transfer being registered unless it is by section 13. And I am of opinion that section does not require that *any transfer* of bonds shall be registered. The language of the section does not require it plainly—it bears in my opinion rather a different construction. The language of the other sections of the Act is wholly against such a requirement; and the intent of the Act, which was and is to make these bonds transferable by *delivery*, would be to some extent, if not altogether, frustrated—simply because transfers in writing are not made of such instruments, and no title could be supported if it had to be traced by a series of written transfers.

In my opinion the Act is fully complied with by the registration of the bonds by the holder or bearer of them, as such holder or bearer, without showing how or when, or from whom he became the holder or bearer. The registration, of course, will be in his name.

I must make the order for the *mandamus*, with costs to be paid by the company.

REGINA EX REL. LEE v. GILMOUR.

Municipal election—Contract with corporation.

A municipality passed a by-law to exempt from taxation, for a term of years, a mill to be built within its limits by a firm of which defendant was a member.

Held, that there was a contract subsisting between defendant and the municipality, and that he was therefore disqualified from holding the office of reeve.

[April, 1881.—*Osler, J.*]

This was an application by *quo warranto* to set aside the election of the defendant as Reeve of Trenton, on the ground, among others, that he had by himself and two partners, at the time of the election, an interest in a contract with the corporation under one of its by-laws. The by-law in question exempted from taxation for ten years any new mill or manufactory to be built by Messrs. Gilmour & Co., within the limits of the municipality of Trenton, in addition to those already operated by them. The defendant was a partner in the firm of Gilmour & Co. The by-law contained the following recital and enacting clause:—

“Whereas, Messrs. Gilmour & Co, propose to erect a new mill or manufactory in addition to those already erected and operated in the said municipality by them, on condition that the said new mill or manufactory be exempted from taxation during the period of ten years from the 1st January, 1880; and whereas it is deemed expedient * * * to accept the proposition of Messrs. Gilmour & Co., the Municipality of Trenton hereby enacts that any new mill or manufactory which may be erected by Messrs. Gilmour & Co. within the limits of the Municipality of Trenton, in addition to the manufactory now operated by them in the said municipality, be exempted from taxation for the period of ten years from the first day of January, 1880. Provided, that such new mill or mills, manufactory or manufactories, be operated within one year from such last mentioned date.”

The by-law also stipulated that the residue of the property of Gilmour & Co., should not by reason of this exemption be assessed beyond the value or proportion at

which other property in the municipality should be assessed.

A new mill had been erected in 1880, in accordance with these terms, and the taxes for that year had been remitted.

W. Cassels, shewed cause.

Foster, supported the summons.

OSLER, J., held that there was clearly a contract subsisting between the municipality and Gilmour & Co. The corporation agreed for a consideration, which Gilmour & Co. had performed, to exempt their new mill, that is, Gilmour & Co. themselves, from taxation for a term of years. The firm had therefore an interest in the contract.

Judgment for the relator, with costs.

KINSEY v. ROCHE.

Division Court—Jurisdiction.

Plaintiff having paid a note of which he and defendant were joint makers, for \$169, but which the plaintiff signed as a surety only ; Held, that plaintiff could not sue defendant in a Division Court for the money so paid, the amount not being ascertained by the signature of defendant.

A summons for prohibition was made absolute *without costs*, there being no meritorious defence.

[August 5, 1881.—*Osler, J.*]

This was an application for a writ of prohibition to the First Division Court of the County of Elgin. The plaintiff and defendant were the joint makers of a promissory note for \$169, payable to Goldie & McCulloch. The defendant contended that it was a partnership transaction, but the learned Judge found as a fact that the plaintiff

signed it as a surety only. After it became due the plaintiff paid it in full, and this suit was brought to recover from the defendant the amount so paid. It was objected that the Division Court had no jurisdiction, because the amount, or original amount of the claim, was not ascertained by the signature of the defendant. (Division Courts Act, 1880, sec. 2.)

Munson (Watson & Doherty), supported the summons.

Culham (Bethune, Moss, Falconbridge & Hoyle), shewed cause.

OSLER, J.—I think the objection is well founded. The plaintiff sues not on a note or upon any instrument which admits a liability to him on the defendant's part, but for money paid at the request of the defendant. How is the amount or original amount of that claim ascertained by the signature of the defendant? Not by the note, for that does not necessarily import, whether you look at the legal or equitable position of the parties, any liability from the one to the other. There was no debt or claim until the plaintiff had paid the note or part of it. It was not ascertained when the note was made. It is said that the note proves the request, but it does not. The request is proved by evidence extrinsic to, and in contradiction of, the contract apparent on the face of the note. No doubt, the possible liability of the defendant to the plaintiff is limited by the amount of the note. It cannot be larger: it may be less; but whatever it is, it is not ascertained by the note.

The claims mentioned in sec. 2 of the Division Courts Act of 1880 are, in my opinion, claims upon instruments such as notes or otherwise, in which a debt or money demand is acknowledged in favor of the creditor. *Cushman v. Reid*, 20 C. P. 147, cited by the defendant, is very much in point.

The summons must be made absolute, but without costs, as there does not appear to be any meritorious defence.

GRIERSON v. CORBETT.

Bail—Ca. sa.—Surrender—Copy of bail-piece.

Where a defendant is arrested by a sheriff under a *ca. re.*, and after verdict is surrendered by his bail to the same sheriff upon an action being commenced against them, the sheriff is not entitled to a copy of the bail-piece before receiving the prisoner into custody; and where such refusal was given, the sheriff was compelled to pay the costs of an application to stay proceedings, and an order was made to extend the time for surrender.

[August 26, 1881.—*Osler, J.*]

The defendant was arrested on a *ca. re.*, and special bail put in. At the trial the plaintiff recovered a verdict, and afterwards sued out a *ca. sa.* to fix bail. An action of *sci. fa.* was commenced against the bail, and on the last of the eight days after the service of the writ, the bail came to the sheriff who executed the *ca. re.*, and wished to surrender their principal. The sheriff demanded, under R. S. O. ch. 50, sec. 42, a copy of the bail-piece, saying that it was his only authority to take the defendant into custody. The bail had no copy, and although they offered to pay all the costs of the *sci. fa.* proceedings, the sheriff refused to take the defendant. When the last day for the surrender expired, the bail would become responsible for the amount of the verdict.

Aylesworth, for the bail, applied to stay all proceedings in the *sci. fa.* action, on the ground that the bail had done all they could reasonably be expected to do in order to surrender the defendant. He contended that where the surrender was sought to be made to the same sheriff who had originally arrested the defendant, a copy of the bail-piece was not required.

Porteous (Robinson, O'Brien & Scott), shewed cause.

OSLER, J., held that when the surrender was to be made to the sheriff to whom the *ca. re.* had been directed, the sheriff was not entitled to a copy of the bail-piece. An order was made extending the time for the surrender, the sheriff to pay the costs of the application.

SCOTT v. MITCHELL.

Attachment—Absconding debtor—Entitling affidavits—Evidence of intention.

The affidavits upon which an order for a writ of attachment against an absconding debtor was issued, were not styled in any Court, although sworn before a commissioner for taking affidavits in the Queen's Bench, who appended to his signature the words "a Com'r in B. R., &c." Held, that the affidavits were sufficient: *Ellerby v. Walton*, 2 P. R. 147, followed; *Hart v. Ruttan*, 23 C. P. 613, not followed.

If a creditor has reasonable grounds for inferring his debtor's intention to defraud his creditors a writ of attachment will not be set aside.

[June 18, 1881.—*Armour, J.*]

On May 9th, 1881, a summons was granted by Mr. Dalton, in Chambers, on behalf of the defendant, calling upon the plaintiff to shew cause why the writ of attachment in this cause, the order of the learned Judge upon which the same was issued, dated 23rd March, 1881, the copy and service upon the defendant of the said suit of attachment, the seizure of the defendant's property and effects thereunder, and all proceedings thereon or had thereunder, should not be set aside on the following among other grounds: 1. That the defendant had no intention of absconding from this Province with the intention of defeating, delaying, hindering, or defrauding, the plaintiff of his just dues, or any of his creditors. 2. That defendant was not an absconding debtor within the meaning of the statute. 3. That sufficient material was not produced to the Judge issuing the order for the writ, to warrant the same being issued against the defendant. 4. That the affidavits upon which the order for the said writ of attachment was granted were not, nor was any of them, nor were they at the time of swearing the same styled in any Court, and not being so styled the commissioners before whom they were sworn had no authority to swear the defendants to them; and that they were not therefore affidavits at all, or were not sufficient affidavits to warrant the issue of the writ. 5. That the affidavits did not comply with the provisions

of the statute. 6. That the copy of the writ of attachment served was not a true copy of the original writ. 7. That the writ of attachment and copy are not marked and endorsed as provided by the statute; and on grounds disclosed in affidavits and papers filed; and why the plaintiff should not pay to the defendant the costs of this application and of the proceedings in this suit, and why in the meantime all proceedings should not be stayed; and leave was therein given to defendant to file further affidavits on the argument of the summons in support of the summons, and in the meantime all proceedings were stayed.

By direction of Mr. Dalton this summons was argued before a single Judge sitting in Court.

McPhillips, supported the summons.

Aylesworth, shewed cause.

ARMOUR, J.—On the argument the contention was reduced to two points: 1st. Were the affidavits upon which the order for the attachment was made, sufficient, never having been entitled in this Court, although sworn before a commissioner for taking affidavits in this Court, who appended to his signature in the jurat of the affidavits, the words “a Com'r in B. R., &c.” 2. Did the defendant depart from Ontario with the intent to defraud his creditors?

It was contended for the defendant that the affidavits upon which the order for the attachment was made should have been entitled in this Court, and *Hart v. Ruttan*, 23 C. P. 613, was cited as determining that point in his favour.

In *Hart v. Ruttan*, a rule *nisi* was obtained from the Court of Common Pleas to rescind an order of Galt, J., discharging a summons to set aside an order of Mr. Dalton, setting aside an attachment against the defendant as an absconding debtor. One of the grounds taken in the summons was, “and that the said affidavits are not, nor is any of them styled in any Court, and not being so styled the commissioners before whom they were sworn had no

authority to swear the deponents to them, and they are therefore not affidavits at all."

The Court, Hagarty, C. J., and Galt, J., (Gwynne, J., being absent), discharged the rule, and in the course of his judgment Hagarty, C. J., says : " There was another point of irregularity taken in the summons, which was clearly fatal, namely, that up to the present time the affidavits on which the attachment was granted are not headed in any Court. *Swift v. Jones*, 6 U. C. L. J. 63; *Allman v. Kersel*, 3 P. R. 110, are in point." * * * * *

"I do not understand why this point, as to the non-entitling of the affidavits, was not argued before us. Taken as it is in the summons, and fully justifying the order made, I cannot overlook it."

In *Ellerby v. Walton*, 2 P. R. 147, a motion was made to set aside the arrest of the defendant under a writ of capias. The affidavit to hold to bail was not entitled in any Court, but there was appended to the name of the commissioner in the print the words, " A Commissioner in B. R. &c." The first objection taken as a ground for setting aside the arrest was, that the affidavit was not entitled in any Court, but Robinson, C. J., who delivered the judgment of the Court, said : " In regard to the first objection, we think the Common Law Procedure Act, sec. 23, does not require any greater strictness of practice than prevailed before in respect to the entitling the affidavit in the proper Court. It was intended clearly to have the contrary effect by doing away with a difficulty, and not to give ground for a new objection. And the jurat being subscribed in this case by a commissioner of the Queen's Bench at Toronto, is sufficient according to several adjudged cases to dispense with the necessity of entitling the affidavit in the Court: 3 Dowl. 17; 7 T. R. 45; 13 East 189."

In *Swift v. Jones*, 6 U. C. L. J. 63, referred to in *Hart v. Ruttan*, a summons was had in Chambers to set aside a Judge's order to hold to bail upon the following among other grounds, that the writ was issued out of the Court of Common Pleas, and one of the affidavits on which it was

issued was entitled in the Court of Queen's Bench, and the other not entitled in any Court, Richards, J., in giving judgment said : " One of the affidavits here is entitled in the Court of Queen's Bench, and the other is not entitled at all. It may be argued that the affidavit might now be entitled, which has a blank for that purpose, but that would not get over the difficulty as to the other, and *both* affidavits are necessary to justifying the arrest. It is true, as I have already stated, that affidavits of debt have been permitted to be used, when sworn to before the proper officer, in England, though not entitled in the Court ; but I think, independently of the question of irregularity in using the affidavit entitled in one Court for the purpose of issuing a bailable process out of another, that our statute was intended to provide expressly for the mode in which affidavits to hold to bail were to be sworn and entitled, when used in either of the Courts. The plaintiff not having followed that course is, I think, clearly irregular in his proceedings. He can gain no support from the argument that the affidavits when produced before the Judge were in their present state, or not entitled at all, for the statute contemplates that they are to be entitled when used, and the Judge undoubtedly supposed the plaintiff would have them properly entitled when issuing his *capias*."

In *Allman et ux. v. Kensel*, 3 P. R. 110, an application was made in Chambers to set aside an arrest upon the ground, among others, that the affidavit to hold to bail was not entitled in any Court. Hagarty, J., in delivering judgment, said : " I quite agree with the views expressed on this point by Mr. Justice Richards, in *Swift v. Jones*, 6 U. C. L. J. 63, and that our statute clearly points out the course to be adopted as to entitling affidavits. I think it was the plaintiff's duty to see it properly entitled when suing out the process : then, and then only, as it seems to me, can he avail himself of the privilege allowed by our statute. On this ground I think the arrest must be set aside."

The provisions of the statute referred to in the last three
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cases above cited, are that "it shall not be necessary that any such affidavit" (to hold to bail or to obtain an order to hold to bail) "should at the time of the making thereof be entitled of or in any Court, but the style and title of the Court out of which the process issues may be added at the time of suing out the process, and such style and title when so added shall, for all purposes, and in all proceedings, whether civil or criminal, be taken and adjudged to have been part of the affidavit *ab initio*." (a)

These provisions do not apply to affidavits to obtain an order for the issue of a writ of attachment against an absconding debtor, and the reasoning of the learned Judges in the cases of *Swift v. Jones* and *Allman et ux. v. Kensel*, founded upon these provisions is therefore inapplicable to such affidavits; and moreover the case of *Ellerby v. Walton* does not appear to have been cited to either of those learned Judges upon the argument of these cases.

Subsequently, in *Molloy v Shaw*, 5 P. R. 250, where an application was made in Chambers to set aside an order to hold to bail upon the ground, among others, that the affidavits to hold to bail were not, nor was either of them entitled in any Court, Richards, C. J., in delivering judgment said: "As to the defective entitling of the affidavits, *Ellerby v. Walton*, 2 P. R. 147, is express authority in favour of the plaintiff, and was decided in the full Court, In the face of that decision I do not feel warranted in setting aside the arrest." And upon the argument both *Swift v. Jones* and *Allman v. Kensel* were cited to him.

In *Damer v. Busby* and *Black v. Wigle*, 5 P. R. 356, applications were made in Chambers to set aside the orders to hold to bail upon the ground, amongst others, in the first mentioned case, that the affidavits were not entitled in any Court, and upon the ground, amongst others, in the second mentioned case, that the affidavit was not entitled in any Court, but was sworn before "a Commissioner in B. R.," and the writ was issued out of the Com-

(a) See now R. S. O. ch. 67, sec. 6.

mon Pleas. Gwynne, J., upheld the sufficiency of the affidavits, following *Ellerby v. Walton*.

In this state of the authorities, *Hart v. Ruttan* was decided, and I think that, with every deference for that decision, being a decision of a Court of co-ordinate jurisdiction, I must follow *Ellerby v. Walton*, being a decision of this Court, and hold that the affidavits upon which the order for the attachment was made were sufficient.

The cases in England will be found in *Chitty's Archbold*, 12th ed., p. 1612. See also *Fraser v. The Municipal Council of Stormont*, 10 U. C. R. 286.

The remaining point to be determined is, did the defendant depart from Ontario with intent to defraud his creditors?

The defendant was resident in Ontario, and was indebted to the plaintiff, and departed from Ontario, and at the time of his so departing was possessed to his own use and benefit of real and personal property and effects therein, not exempt by law from seizure; and if he so departed with intent to defraud his creditors, he fulfilled all the conditions requisite to his being deemed an absconding debtor, and the order for the writ of attachment was properly supported. The only question for my determination therefore is, had the defendant such intent, and whether such intent existed is not a fact to be certainly determined, but an inference of fact to be drawn from the whole of the circumstances under which the defendant departed from Ontario, and unless I am satisfied beyond reasonable doubt, on the evidence before me, that the plaintiff ought not reasonably to have drawn such inference, and that the said circumstances did not warrant a reasonable man in the plaintiff's position drawing such an inference, I cannot interfere.

The affidavits filed by and on behalf of the respective parties are very conflicting in some particulars, making it difficult to ascertain the truth in such particulars; and as in the trial of a dispute upon affidavits, victory seldom crowns that litigant who has truth on his side, but that

litigant who has the most deftly drawn affidavits, I shall first of all ascertain the facts which are not denied, and if they, in my opinion, afforded to the plaintiff reasonable ground for the inference of intent that he drew, I shall uphold the proceedings which he took, without venturing to guess at what may be the truth with regard to the denied facts.

The undenied facts material to be considered are these. The plaintiff and defendant were both farmers, residing some three-quarters of a mile apart, in the township of Turnberry, in the county of Huron. The defendant, on the 19th day of March, 1880, gave to the plaintiff, for a pre-existing debt, his promissory note bearing that date, and payable three days after date, for the sum of \$447, with interest at the rate of ten per cent. per annum until paid. He also handed to the plaintiff, as collateral security for the payment of the said note, certain promissory notes of third parties, amounting to the sum of \$182.15. At this time the defendant owned three farms in the township of Turnberry, being lot number 15 in the 10th concession, and lots numbers 9 and 10 in the 11th concession. The defendant, on or about the 30th day of May, 1880, went to the State of Michigan, "to look at land there, with the intention, if pleased therewith, of purchasing a farm in that State and ultimately removing thither." He purchased a farm in Chippewa county, in that State of about 320 acres, and returned to Turnberry about the 1st of July, 1880. He remained in Turnberry till some time in September, 1880, and then returned to Michigan with, as he swears, "the intention of improving my said farm, buying other lands in addition thereto, and erecting thereon a house, contemplating and intending to return to the township of Turnberry in the month of April thereafter, and meaning ultimately to remove permanently my wife, family, stock, implements and effects, to my new farm in the State of Michigan, in the ensuing spring or summer." During the summer of 1880, the defendant sold lot number 15 in the 10th concession, valued at about \$5,000, but for

what price, or what disposition he made thereof, does not appear; he also sold a large amount of his present property, including farm stock, but for what price, or what disposition he made thereof, does not appear. When the defendant went away in September, he left behind him, as he swears, a large quantity of wheat, hay, oats, and other products and stock, sufficient in value to pay and satisfy all his debts in full. The plaintiff swears that the wife of the defendant, after the departure of the defendant, sold off the grain and a number of the farm implements and stock, and was converting the same into cash. This statement the defendant does not deny, but his wife swears that the paragraph of the plaintiff's affidavit in which it is contained is false and untrue in every particular. The defendant does not shew at all what has become of this "large quantity of wheat, hay, oats, and other products and stock," or whether it is still available for the payment of his debts; and the plaintiff swears, and this is not denied, that the valuation of the personal property seized by the sheriff, is only the sum of \$400 and some odd dollars.

When the defendant went away, he left with one Benj. Wilson a power of attorney to sell and dispose of lots 9 and 10 in the 11th concession of Turnberry. Upon these lots, which the plaintiff swears were worth \$3,000, there was a subsisting mortgage for \$2,000; and under this power of attorney Wilson sold and disposed of these lots for the sum of \$2,500, but at what date does not appear. The plaintiff, however, states, and it is not denied, that the said Benjamin Wilson, as he was informed by the said Wilson, and the wife of the defendant, had agreed with one George Muir (this, as I understand it, was before the issuing of the attachment), with the consent and approbation of the wife of the defendant and Andrew Mitchell, the brother of the defendant, to sell to the said George Muir the said lots for the price of \$2,100, which said sum was considered by the said Wilson, Andrew Mitchell, and the wife of the defendant as a fair and proper value for the same. It appears that when the defendant went away he was

indebted to others than the plaintiff, and that he left a list of such, his creditors, with the said Wilson ; but neither he nor Wilson, who makes an affidavit, gives any statement of who the creditors were, or to what amount they were such creditors ; and the plaintiff swore that there were other creditors besides himself. It is to be observed also that the defendant disputes the plaintiff's claim either in whole or in part, and that some statements made by the plaintiff in his affidavit, and denied by the defendant's wife, are not denied by Wilson, although they called for a denial by Wilson, if he could deny them, as well as by the wife.

I think that, upon these facts, the plaintiff was justified in drawing the inference that the intent of the defendant was to defraud.

The rule will therefore be to discharge the summons, with costs.

RE NORTH OXFORD ELECTION.

Controverted election—Preliminary objections—Answer—Embarrassing matter—Jurisdiction.

In a Dominion Controverted Election case, a sitting member can file a cross petition only against a candidate who is not a petitioner.

Where the respondent had filed certain preliminary objections to the petition, which were overruled, he was not allowed to insert similar objections in his answer, and the clause containing them was struck out.

The respondent cannot, in his answer, set up that the petitioner was by himself and his agents, guilty of corrupt practices, whereby he became disqualified to be a candidate.

The Court or a Judge has power on a summary application to strike out any allegations in an answer which are not an answer in law, and might be embarrassing at the trial of the petitioner.

[June, 1881.—*Hagarty, C. J.*]

THE original petition herein was filed by G. R. Pattullo, on the 15th of January, 1881, seeking to avoid the election of Sutherland, the respondent, on the ground of alleged

corrupt practices by respondent and his agents, but not claiming the seat. This petition was not served within five days after its presentation, nor was any application made by the petitioner, within the said period of five days, to extend the time for service.

On the 3rd of February, an application for the extension of the time for service was made, and on the 18th of February the application was granted. On the 19th of February the petition was served.

The respondent, Sutherland, filed preliminary objections to this petition, which were overruled. The respondent then, for an answer to the said petition, after denying all charges of corrupt practices, stated, in the second and third paragraphs of his answer :—

" 2. The respondent further says that he was not, within the time limited by the statutes and the rules of this Honourable Court in that behalf, served with a copy of the petition presented in this matter against his return, nor was he, within the said time, served with a copy of the deposit receipt, as required by the statute ; and that no order extending the time for such service was made within five days after the presentation of the said petition ; nor was any application for such order made within the said period of five days ; nor was any order made by this Honourable Court, or a Judge thereof, for substitutional service of the said papers upon him ; and he submits that in consequence of the want of such service and order, there is no jurisdiction in this Honourable Court, or any Judge thereof, to proceed further in the matter of the said petition.

" 3. The respondent further says that the said petitioner, by himself and his agents, before, at, and after the said election, was guilty of corrupt practices as defined by the Dominion Elections Act, 1874, the Dominion Controverted Elections Act, 1874, and the amended Acts, whereby the said petitioner became disqualified to be a candidate for membership in the House of Commons at the said election, and whereby he ceased to have any status to impeach the said election, or the return of the said respondent thereat."

The petitioner, Pattullo, thereupon obtained a summons to strike out the second and third paragraphs of the answer,

as affording no answer to the petition, and as having been already practically disposed of by the overruling of the preliminary objections.

On March 5th, the sitting member, Sutherland, presented a cross petition, complaining of corrupt practices personally committed by Pattullo at the said election; to which cross petition Pattullo, the respondent therein, presented the following preliminary objections:—

“ 1. The publication in the *Canada Gazette*, by the Clerk of the Crown in Chancery, of the receipt by him of the return to the writ of election upon which the above named election was held, took place on the 24th day of December, A.D. 1880, which the respondent is ready to verify, and which will appear by reference to the issue of the said *Canada Gazette* of the said date.

“ 2. The said petition does not question the election or return of any member upon an allegation of corrupt practices; nor does it specifically allege any payment of money, or other act of bribery, to have been committed by any member, or on his account, or with his privity, since the time of such return, in pursuance or furtherance of such corrupt practice, within thirty days next preceding the presentation of said petition; and the said petition was presented on the 5th day of March, A.D. 1881, more than thirty days after the said date of publication in the *Canada Gazette*.

“ 3. The said petitioner is the sitting member for the said North Riding of the County of Oxford, who was returned as elected at the said election; and his said election, and the return thereof, have been duly petitioned against by the above named respondent, George R. Pattullo; and such petition against the election and return of the said petitioner, James Sutherland, was duly served upon him on the 19th day of February, A.D. 1881; and the present petition by the said James Sutherland is a cross petition, consequent upon the said petition of the said respondent, George R. Pattullo, against the election and return of the said James Sutherland; and the said cross petition does not complain, within the meaning and intent of the statute in that behalf, of any unlawful and corrupt act by any candidate at the same election who was not returned, and who is not a petitioner, and in whose behalf the seat is not claimed.

"4. The presentation of the said cross petition was not completed by service thereof within the fifteen days after service upon the said petitioner, James Sutherland, of the said petition against his election and return, prescribed by the statute in that behalf.

"5. No cross petition is proper or necessary under the circumstances aforesaid, inasmuch as the charges against the respondent, made in and by the said cross petition, may and can, under the statute and Rules of Court in that behalf, be raised and investigated, without any cross petition, upon the trial of the said petition filed by the respondent against the return and election of the petitioner.

"6. The said cross petition does not state the nature of the alleged corrupt practices which are intended to be charged against the respondent with sufficient precision, or particularity, to inform the respondent whether the petitioner intends, in and by the said cross-petition, to charge him with bribery, under section 92; treating, under section 94; undue influence, under section 95; hiring of teams, or payment of voters' travelling and other expenses, under section 96; or personation, or subornation, under section 97 of the Act 37 Vic., cap. 9; and the charges made against the said respondent in and by the said cross petition are altogether too vague, general and indefinite to put the said respondent upon his defence with respect to said charges, or upon answer to the said cross petition."

The summons to strike out the above paragraphs of the answer to the original petition, and the question of the sufficiency of the preliminary objections to the cross petition, were argued together.

Bethune, Q.C., for Sutherland.

Shepley, for Pattullo.

HAGARTY, C. J.—I think I must hold that the Supreme Court, in *Valin v. Langlois*, 3 Sup. Ct. 90, have clearly decided that the sitting member can only file this cross petition against a candidate who is, *inter alia*, not a petitioner. This is the language of the Chief Justice, and the majority of the Court seem to hold that view. Mr. Justice Taschereau points out some possibly unforeseen objections to such legislation, but agrees in the result.

The present cross petition does not allege any corrupt practices since the election. I think it cannot be allowed, and must be removed from the files of the Court, and the deposit returned to the petitioner.

As to the objections to the original petition:—

1. As to the non-service of the petition within five days, and the absence within that period of any order for substitutional service, &c.; I am of opinion that such objection cannot be allowed. This Court has already pronounced judgment upon these objections, and they must not be sent down to the Judge at the trial of the petition either as matter of discussion before him, or with a view of bringing such question before the Supreme Court.

It appears clear to me, that the Legislature has entrusted to this Court the decision of all matters as to the regularity of the proceedings on an election petition, and the preparation thereof, and of the questions raised for trial before the Judge. The only appeal allowed is from his decision. I can add nothing to the very lucid statement of the law on this subject made by Mr. Justice Strong, in *Brassard v. Langevin*, 2 Sup. Ct. p. 321. The case seems clearly in point. There the Court below dismissed the petition for defects in the service, and the Supreme Court declared that they had no jurisdiction to interfere, though the result might be a total exclusion of all means of investigating some very grave charges.

In this case, the result of the Court's decision was not to prevent, but to facilitate, investigation. I think this objection cannot be allowed.

As to No. 3, charging that the petitioner was, by himself and his agents, guilty of corrupt practices, whereby he became disqualified to be a candidate, or to be elected, and ceased to have any status to impeach the election, I hardly see how this can be urged by the respondent as an answer to the petition. The Legislature has provided means by which the objection of bribery by an unsuccessful candidate can be reached. 37 Vic. ch. 10, sec. 7, provides that a petition, complaining *inter alia*, of any unlawful act by any can-

dicate not returned, by which he is alleged to have become disqualified to sit in the House of Commons, may be presented by any of the following persons:—1. A person who had a right to vote. 2. A Candidate. Then comes the provision that nothing herein contained shall prevent the sitting member from objecting, under sec. 10, to any further proceeding on the petition by reason of the ineligibility or disqualification of the petitioner, or from proving, under sec. 66, that the petitioner was not duly elected. This section (66) is confined to the case where the seat is claimed. Sec. 10 refers to the preliminary objections, or grounds of insufficiency against the petition, or the petitioner, or against any further proceeding thereon. This section (10) enables the respondent to attack the status of petitioner. It was hardly pressed before me that the status of the petitioner could be affected on these allegations, or that, before any enquiry even much less before conviction, the objections could prevail.

Under the statute, the respondent, Mr. Sutherland, as well as any person entitled to vote, could, within the thirty days after the gazetting of the return, have presented a petition against Mr. Pattullo, complaining of any unlawful act committed by him, although he had not been returned. This provision (under sec. 7) gives ample opportunity to any elector, or any candidate desirous of securing purity in election contests, to expose and punish all corrupt practices, disqualifying unsuccessful as well as successful candidates. If the respondent cared not to avail himself of this provision until his own right was attacked, I do not see that he can reasonably complain. He has the further right, within the fifteen days after he has been served with the petition, to attack the unsuccessful candidate, provided the latter be not the petitioner. I do not profess to be able very clearly to understand the design of this provision, but the language used is too clear as to the limitation of the right. It seems to me, therefore, that the respondent has lost the right to urge as an answer to the petition the matters contained in the third paragraph of his answer. The statute is silent as

to our interference with the answer, but I think we must exercise the right of seeing that no matters are urged as answers to the petition which we consider to be no answer in law, as, if left on the record, they might embarrass the enquiry before the Judge at the trial.

I think the second and third paragraphs of the answer must be struck out, with costs to be costs, in any result of the cause, to the petitioner. I also think the petitioner entitled to the costs of removing the cross petition from the files of the Court.

I do not desire that anything I have said should be used in any way to limit or fetter the discretion of the Judge at the trial, in enquiring into the matters charged, or in discharging the duty imposed on him by sec. 30, in reporting to the Speaker of the House of Commons.

Order accordingly.

WOODRUFF v. CANADA GUARANTEE COMPANY.

Verdict—Interest—Ascertained amount.

In an action against the sureties of an absconding assignee in insolvency, on the assignee's bond to the Queen under the statute, a verdict was entered at the trial for \$800, subject to a legal question, which was afterwards decided in favour of the plaintiff. It was agreed by the parties that in case of such a decision, the amount for which the verdict should be entered was \$700.

Held, that the verdict was not for a debt or sum certain within R. S. O. ch. 50, sec. 269, and that it should not carry interest from its entry.

[June, 1881.—*Hagarty, C. J.*]

This action was in form on a bond to the Queen, conditioned for an assignee in insolvency duly accounting, &c. The plaintiff was the assignee appointed after the absconding of his predecessor. He sued under the Insolvent Act. The case was tried before Hagarty, C. J., at St. Catharines, in October, 1879, and by consent a verdict was entered for

the plaintiff for \$800, subject to a legal question, which before the following term was decided in favour of plaintiff.

Nothing was done toward enforcing the verdict for 15 or 16 months. Then, on an application in Chambers to Mr. Dalton, it was admitted that the proper amount for which the verdict should have been was \$700, instead of \$800, and that no costs were to be charged. An order was made to stay proceedings on payment of \$700, with interest from the entry of the verdict. From this allowance of interest the defendants appealed.

Aylesworth, for the defendants supported the appeal.

Rose, for the plaintiff.

HAGARTY C. J.—It was considered in Chambers that this verdict came within the provisions of the C. L. P. Act, R. S. O. ch. 50, sec. 269. When a verdict is rendered "for any debt or sum certain, on any account, debt or promises" such verdict shall bear interest from the time of rendering, &c., &c. I am unable to consider this verdict as falling within this clause. It seems to me to be a verdict for unliquidated damages. It is urged that it was a sum fixed and adjusted, as it were, by the act of the parties.

Mr. McCarty, the attorney and counsel for plaintiff, swears that a nominal verdict was entered for \$800, "which it was agreed between myself and said J. C. Rykert should be reduced to the sum of \$700, without costs." Mr. Rykert's affidavit for the defence says that the agreement was that the verdict should be taken for nominal damages, subject to the opinion of the Court on legal points, and that after decision thereon the amount collected by McEdwards, the defaulter, was to be ascertained. He then states the taking of the \$800 verdict, and the agreement that it should be reduced to the actual amount received, and that he was always ready to pay the \$700 without costs.

There was never in my opinion a sum certain fixed and adjusted by the parties for which, as such, an action would have lain, but that the suit had to be on the instrument.

If defendant's counsel had refused to assent to a verdict at the trial or retracted his assent, the plaintiff could not have recovered except on proof in the usual way. *Brown v. Blackwell*, 26 C. P. 43.

The case of *Luckie v. Bushby*, 13 C. B. 864, is a very elaborate exposition of the law on this subject. To a declaration on a policy of assurance averring a partial loss, defendant pleaded that before action the amount of the loss he should pay was adjusted and settled at a certain rate, and the amount thereby liquidated and ascertained, and he pleaded a set-off. On demurrer it was held that notwithstanding the adjustment the action was still for unliquidated damages. Jervis, C. J., says, that the adjustment being merely the evidence of the amount which the parties have agreed between themselves to be due, does not make the debt so ascertained and certain as to place it upon the footing of a claim for liquidated damages. Cresswell, J., says, that the adjustment was only a mode of enabling a jury more easily to arrive at a proper conclusion.

There is an additional difficulty here, that the order in chambers in effect sets aside, or at least alters the verdict rendered at the trial. Except by consent or a full admission of specific facts this can hardly be done. But in any view, and assuming an admittedly correct verdict for the lesser sum of \$700, I think interest cannot be allowed, and I vary the order accordingly.

IN RE JOHNSON AND THE TORONTO GREY, AND BRUCE
RAILWAY COMPANY ET AL.

Mandamus—Railway bonds, registration of.

The Canadian Bank of Commerce received from M. R. & Co., bankers in London, bonds of the T. G. & B. Ry., to the amount of £105,800, represented by M. R. & Co. as belonging to different persons named, and tendered them for registration at the railway office, in order that these persons might vote thereon. The secretary of the Railway Company registered such of the bonds as stood in the names of the original holders, but refused to register the others unless written transfers from the original holders were produced:

Held, that the company should register the bonds without the production of the transfers; that the proof of title in the alleged owners was sufficient; that the issue of scrip in London as representing the bonds formed no objection; and a mandamus to register the bonds was granted.

[July, 1881.—*Wilson, C. J.*]

A summons was obtained calling upon the railway company to shew cause why a *mandamus* should not be issued directing the company to register the bonds of the respective holders thereof. The facts appear in the judgment.

S. H. Blake, Q. C., and Miller, shewed cause.

McCarthy, Q. C., Martin, Q. C., and Clement, supported the application.

WILSON, C. J.—It appears by the papers filed that the Bank of Commerce, in this city, received, on 24th June, for Messrs. Morton, Rose & Co., Bankers, London, England, bonds of this railway company to the amount of £106,800 sterling, belonging to the different persons and firms named in the schedule thereto, and annexed to the affidavit of the deponent, Lancelot Bolster, accountant in the Bank of Commerce, with instructions to tender the same for registration at the railway office for the purpose of voting thereon at the meeting of the company to be held on the 28th June.

The affidavit shews the bonds were, on the 24th June, duly entered at the railway company's office for registration, when the secretary of the railway company said “he

would only register such of the said bonds as stood in the names of the parties to whom said bonds had been originally issued by the company, and in all other cases the parties respectively requiring registration would have to produce written transfers from the persons to whom the company had originally issued the said bonds, and from all subsequent holders thereof down to, and inclusive of, the transfer to the persons respectively now requiring registration; and if such transfer were produced he would register the said bonds, otherwise he would refuse to do so."

The affidavit shewed that the bonds set opposite the names in the schedule, and numbered 22, 26, 27, and 33, were registered by the company, as the bonds appeared by the company's books to have been issued to the persons in whose names the registration was desired to be made.

A copy of letter of the 11th of June, inst., from Messrs. Morton, Rose & Co. to the manager of the Bank of Commerce, was produced, stating that these bonds were transmitted.

An affidavit was filed by Mr. Beatty, the president of the railway company, in which it appears that he went to London for the purpose of having a conference with the bondholders of the company residing in Great Britain: that he, Mr. Beatty, did not believe Mr. Cramshaw, named in the schedule of the applicants as the bondholder of some of the bonds in question, to be the holder of the bonds he is there represented to be the holder of: that Mr. Cramshaw lately issued a circular in reference to the meeting to be held here on the 28th inst., stating as follows:—

"Arrangements have been made whereby Messrs. Morton, Rose & Co. could receive them (the bonds) and temporarily issue scrip to represent them. There will then be this double advantage. There will almost certainly be a market for the scrip on the stock exchange, while at the same time the holders are exercising their voting power at the meeting at Toronto."

Mr. Blake contended strenuously that the persons alleged to be the holders of these bonds were not shewn to be

actually the holders of them. The most that was shewn was that Morton, Rose & Co. represented these persons to be the holders, while for anything that appeared they might just as well have represented any other number of persons to be the holders: and because it also appeared that Morton, Rose & Co. were to issue, or had issued, scrip as representing these bonds, which scrip was to be used on the stock exchange, that is, in the disposition of the bonds to purchasers, while the bonds themselves were to be acted upon here, at the intended meeting, by the very persons who were transferring these bonds to others; so that, at the time of voting, one class of persons might be the holders of the scrip, and as such have the equitable ownership of the bonds and the right of voting, while another class of persons might be actually voting upon the bonds as the continued holders of them.

As to the title of the applicants to the bonds, I think, as Morton, Rose & Co. have produced the bonds and have represented particular persons to be the holders of them, that it may fairly be presumed that such persons are the holders. I do not say that better evidence might not be given of that fact; but, in the absence of anything to create suspicion, and as it is the special business of bankers, as Morton, Rose & Co. are, to deal in this manner for their customers, it is not unreasonable to assume that the facts are just as they are represented to be; and particularly when the railway company has acted upon the communication of Morton, Rose & Co. as authorized and genuine, by registering some of the bonds which they so forwarded, and by not objecting to the kind of power or testimony which they put forward as their warrant for the power or office which they were assuming to exercise.

With respect to the issue of scrip in London as representing these bonds, I do not think that will invalidate the right of the actual holders of the bonds to vote upon them, and to deal with others in respect of them as the absolute owners, so long as those so dealing with them have no notice of any transfer or disposition of them having been

made, adverse to the acts or dealings of the holders of the bonds, with such innocent parties.

It must frequently happen that persons who have given proxies to others to vote upon are dead at the time of voting, or that the proxies have been cancelled, or that the registered shareholder or bondholder has parted with his stock or bonds at the time of voting; and that may be the case here with respect to some of the bonds which have been duly registered. It is impossible to guard against such events, and I do not think the scrip so issued upon these bonds will create more difficulty than in any of the above contingencies happening in cases in which no scrip has been issued.

I am of opinion that the applicants, on the material before me, have made out a right to have the bonds registered. Their title might certainly have been better proved; but whatever objection there was to it has, as I have already stated, been cured, in my opinion, by the railway company.

The writ will be ordered to issue, and I must, of course, give the costs of the application.

BUNTING ET AL. V. LAIDLAW ET AL.

Railway bonds—Voting—Victoria railway.

By the Act of incorporation of a railway company, every shareholder was entitled to one vote for every share held by him. It was provided by the same Act, that if the interest on the bonds issued by the company should be in arrear, all holder of bonds should have the same right of voting and qualification for directors as were attached to shareholders. *Held*, that the bondholders were not entitled to more than one vote on each bond.

[May, 1881.—*Galt, J.*]

This was an application for the issue of a peremptory writ of *mandamus* ordering the defendants to admit the plaintiffs respectively into the office of Directors of the Victoria Railway Company.

This railway company, which was incorporated under 34 Vic. ch. 43, O., made an agreement with certain parties, called the syndicate, by which the latter advanced moneys for the purposes of the road and received bonds as security. The bonds were of the value of £100 stg., each, and bore interest payable half yearly. The interest upon these bonds being in arrear when the General Annual Meeting of the Company was held, at which the directors should be elected, the syndicate claimed the right to vote on all their bonds, whether registered or unregistered. They further claimed that they had the right to one vote for every \$50 of the aggregate amount of the bonds held by them so as to equalize them in voting with the shareholders who were entitled to one vote for every share held by them, the shares being of the par value of \$50 each. The plaintiffs were elected directors by the syndicate votes and the defendants by the shareholders.

The facts were admitted and upon them three questions were submitted for the opinion of the Court. The judgment proceeded upon the third ground which was:—

3rd. Whether bondholders were entitled to cast more than one vote for each bond?

It was agreed if the opinion of the Court should be in the negative on any one of these questions, judgment should be given for the defendants.

McLennan, Q. C., for plaintiffs.

Cattanach, for defendants.

GALT, J.—As to the third question. The Victoria Railway Company was originally incorporated under the name of The Fenelon Falls Railway. By the 16th section of that Act of incorporation, 34 Vic. ch. 43, every shareholder is entitled to one vote for every share held by him. By the 33rd section, the company have power to issue bonds. This section contains the following proviso: “And provided, also, further that in the event at any time of the interest upon the said bonds remaining unpaid and

owing, then at the next ensuing general annual meeting of the said company, all holders of bonds shall have and possess the same rights and privileges and qualification for directors and for voting, as are attached to shareholders." The bonds in question have been registered, and are admitted to be each of the nominal value of £100 stg. The third question as above stated is, whether a bondholder is entitled to cast more than one vote for each bond. Unless special provision is made to enable a bondholder to vote, he has no such right, being simply a creditor and not a proprietor. But it having been found in several cases in this Province that the amount of share capital subscribed bore a very small proportion to the cost of the road, the Legislature has thought it advisable in some instances to give bondholders a direct control in proportion to the amount of the bond capital invested, and have made provision accordingly. The first instance in which this was done, was by 23 Vic. ch. 105, an Act respecting The Northern Railway of Canada, which enacted, "That at all meetings of the company, the holders of the first and second preferential bonds hereby authorized, shall be entitled to vote in the proportion enacted in the said Act, that is to say, every share of £5 currency, shall entitle the holder thereof to one vote, and over £5 currency of bond capital, shall entitle the holder thereof to one vote." By the 25 Vic. ch. 56, sec. 31, similar provision is made as respects the Grand Trunk Railway and also by 27 Vic. ch. 57, in relation to the Brockville and Ottawa Railway Company. It is to be observed that in these cases bondholders have an absolute right to vote, but it is not so with respect to the Victoria Company. There was no original right of voting, but such privilege was to arise after the default had been made in payment of the interest, and no provision was made as was done in the case of the Brockville and Ottawa road, respecting the number of votes to which holders of bonds for £100 stg. should be entitled. In the absence of all direction in the statute, I am of an opinion that bondholders are not entitled to cast more than one vote for each bond.

As it was agreed, if my opinion was against the plaintiffs on any one of the questions, judgment was to be given for the defendants, declaring the said R. W. Elliott and the defendants duly elected directors of the company, with costs, I give judgment accordingly.

CHANCERY CHAMBERS.

RE COLTON, FISHER v. COLTON.

Administration—Suretyship—Executrix de son tort—Practice.

It is competent to the Court, on a proper case being made, to appoint or dispense with an administrator *ad litem*, and then to direct an account, but to justify such an order the nature and amount of the personal estate must be shown.

When a claim against a deceased's estate is one arising out of a contract of suretyship, the Court will not, unless by consent of all parties, make an administration decree except on a bill filed.

Semblé, that administration of an estate will not be ordered by the Court where no legal personal representative has been appointed or dispensed with, though an executrix *de son tort* is before the Court.

[October 5, 1880.—*Proudfoot, V.C.*]

The facts sufficiently appear in the judgment.

Hoyles, for the motion.

H. Cassels, contra.

PROUDFOOT, V. C.—A notice of motion has been given on behalf of a creditor of Joseph Colton, an intestate, to administer his estate, which has been served on his widow and next of kin. No administration has been taken out to him, and the notice also notified an intention to ask for the appointment of an administrator *ad litem*, or to dispense with representation. From the affidavits filed it would appear that the widow was executrix *de son tort*, and that the personal property was small,

The next of kin object that no administration *ad litem* will be made by the Court, under such circumstances, nor representation dispensed with; that the Court must be first seised of a properly constituted suit before any such

order will be made; and that a general administration of the estate will not be granted without a legal personal representative, although an executrix *de son tort* be a party.

There are conflicting decisions upon this last point, *Rayner v. Kaehler*, L. R. 14 Eq. 262; *Coote v. Whittington*, L. R. 16 Eq. 534, and *Re Lovett*; *Ambler v. Lindsay*, 3 Ch. D. 198, holding that the presence of an executor *de son tort* is enough, while *Cary v. Hills*, L. R. 15 Eq. 79; *Rowse v. Morris*, L. R. 17 Eq. 20,* hold the contrary; and I think the latter is the more correct determination.

I do not intend to decide the other question that was discussed, viz., whether the Court can appoint a personal representative and then order administration, or dispense with such representation unless during the prosecution of a regularly constituted suit or proceeding, because there is another ground upon which I think an administration decree should only be made in this case on a suit by bill.

From the affidavit of Fisher, the creditor, it seems that the debt was not the debt of Colton, but of one Samuel Tungate, who had given a mortgage to Fisher to secure it. Colton entered into the covenant now being sued on, by which he agreed that Tungate would pay to Fisher \$900, and interest at seven per cent., at the times specified in the mortgage. Tungate was the principal debtor, and Colton was surety for him. The G. O. 62 does not authorize the suing of a surety without his principal. The cases establishing this are cited in *Tayl. Ord.* 154, and their effect was admitted *arguendo* on the rehearing of *The Exchange Bank v. Barnes*, now standing for judgment.

The general rule requiring a principal to be sued with a surety may be found in *Story's Eq. Pl.* s. 169, where the cases cited are generally, I think, instances of the principal and surety being united in the same bond. But it is, I apprehend, a matter of no moment whether they became bound by the same or different instruments. The relation

* See also *Outram v. Wyckhoff*, 6 P. R. 150; and *Re Freeborn, Freeborn v. Carroll*. *Ib.* 188.

of principal and surety is the main point, and while that exists the rule will apply. Nor does it make any difference that the suit is against the assets of a deceased surety, His estate is entitled to have the principal present.

The principal is the person who ought to pay the debt, and the surety or his estate is entitled to a remedy over against him, and to the benefit of any securities he may have given the creditor. It is no answer to say that the mortgaged property is insufficient ; the surety paying the debt ought to have it transferred to him, subject to the right of redemption by the principal. And he may also require a personal order against the principal for any deficiency ; and there is nothing to shew that it would be unproductive.

The peculiar character of the rights of principal and surety, and the intricate nature of the questions arising out of that legal relation, render it inexpedient, as I am at present advised, to have them dealt with on a summary application of this nature.

Whether on such a bill being filed the Court would be sufficiently seised of the matter to enable it to appoint an administrator *ad litem*, or to dispense with representation altogether, it is premature to determine.

The present motion is refused, with costs. *Quaere*, whether I should direct a bill to be filed.

On a subsequent day the application was renewed, and the following judgment delivered.

[October 11, 1880.—*Proudfoot*, V.C.]

PROUDFOOT, V. C.—Mr. Hoyles now tells me that Tun-gate, the principal debtor, is willing to be made a party, and to account. This I apprehend, would scarcely suffice unless the other parties were willing that the account should be taken in this mode of proceeding. But this need not be further considered, as I think, on other grounds

that a representation ought to be made, or dispensed with by the Court.

I have considered the statute and the evils it was intended to remedy, and in a proper case I think an application might be made, as in this instance, to appoint, or to dispense with an administrator *ad litem*, and then for an account. But to justify such an order it would require to appear, not only in general terms, that the estate was small, but a statement ought to be produced and verified shewing of what the personal estate consisted, and how it has been disposed of; and that an application to the Surrogate Court would be a useless expense. For it never was contemplated by the Act that this Court should assume the functions of the Surrogate Court, and grant administration in any case when a litigant chose to say the assets were small or trifling. Large and small are relative terms, and what to one might appear small to another might have a different aspect. The Court should have the figures before it to decide for itself. In this instance, besides the personal property to which reference is made in the affidavits, an asset of the estate consists of the claim against Tungate, an item of some importance; and for aught I know there may be others.

I think I cannot dispense with a legal representative, or appoint one, and I must still refuse this motion; and although the reasons upon which I proceed are not those most prominently urged upon the argument, they are all embraced in the objection that was made by the defendants, and therefore the usual rule should apply, and the costs follow the result.

RE McMILLAN—PATTERSON v. McMILLAN.

Partition—Adverse possession—G. O. 640—Practice.

[January 31, 1881.—*Spragge, C.*]

This was a partition suit before the Master at Cornwall under G. O. 640.

The defendant, who occupied the property in question, claimed an absolute title by possession under the Statute of Limitations.

The Master, notwithstanding, continued the enquiry and proceeded to take evidence.

Hoyle, for the defendant now moved for the direction of the Court.

Symons, for the plaintiff.

SPRAGGE, C., directed the plaintiff to file a bill within two weeks, and the parties to go to a hearing at the then ensuing sittings at Cornwall, costs to be costs in the cause.

HAYES v. HAYES.

Report—Filing of—Appeal.

A report must be filed before a notice of appeal from it is given. *Sembla*, that seven clear days notice of appeal is necessary.

[March 21, 1881.—*Blake, V.C.*]

This was a suit for an account of dealings as to a policy on the life of one Richard Hayes, deceased. The Master having found in favour of the defendant, the plaintiff appealed. The report was dated the 2nd March, 1881,

and was taken out by the plaintiff's solicitor, but not filed until after he had given his notice of appeal.

The notice of appeal was served on the 14th March, for the 21st. The report was filed on the 15th March.

E. D. Armour, for the respondent, objected that the notice was too short. The length of notice required by G. O. 642 is seven days. This means that seven days should intervene between the filing of the notice and the day of its return. The words "At least seven days" in order 418 as to setting down, on further directions, have been so construed, and there is no difference between "seven days" and "at least seven days." Again, the appeal is before the Court from the day of giving notice, but the report is not before the Court till filed. It is still a proceeding before the Master, and there cannot be an appeal from a proceeding which is not upon the records of the Court. An order cannot be appealed from till it is enforced.

Donovan, for the appeal, contended that when a certain time was allowed for a proceeding the first day was counted, but not the last. This appeal would thus be in time. He also argued that the report was complete when signed, stamped and issued, and that the filing was only for the purpose of confirming it.

BLAKE, V. C., held that an appeal would not lie from a report until the same had been filed, as until filed it remained a proceeding in the Master's office, and was not before the Court, and therefore he declined to hear the appeal.

He was of opinion that seven clear days' notice should have been given, but he refused to hear the appeal by reason of the first objection.

RE LAYCOCK—MCGILLIVRAY V. JOHNSON.

Sale—Leave to bid.

A Master has no power to give leave to bid to a party conducting a sale. Application must be made to the Court.

[April 11, 1881.—*Blake, V. C.*]

This was an administration suit.

After an abortive sale by auction tenders were advertised for without effect.

The property was then ordered to be resold under the conduct of the plaintiff.

Pending the sale the plaintiff obtained leave from the local Master to bid at the sale, and at the solicitation of all parties to the suit purchased the property at what was shewn to be a good price.

This was a motion to confirm the Master's report.

Hoyles, for the plaintiff's solicitors, supported the motion.

Plumb, contra, for the guardian, did not oppose the motion, but the guardian had not been made aware that the Master had given leave to the plaintiff to bid.

BLAKE, V. C.—One of the most stringent and zealously guarded rules of Court is, that a party's *prima facie* interest will not be permitted to conflict with his duty. The vendor's duty is to get as high a price as possible—his interest, if allowed to bid, to pay a low one. The jurisdiction in such cases rests exclusively with the Court, and the local Masters cannot invade the Court's prerogative, and expect to have that invasion confirmed by *nunc pro tunc* orders.

The plaintiff's solicitor presumably knew the well-established practice of the Court, the growth of many years, the subject of many reports, and should have asked the leave of the Court before the sale. To encourage this practice would be to establish a most dangerous precedent.

I refuse the application.

FULLER V. MCLEAN.

Report—Vacation—G. O. 425—Notice.

A Master's report made during long vacation in contravention of G. O. 425, is as against a defendant having no notice of the proceedings on which the report is founded, entirely null and void.

[June 22, 1881.—*Boyd, C.*]

This was an application by the plaintiff for an order for the examination of the defendant as a judgment debtor.

The plaintiff was assignee of a mortgage made by the defendant, and had filed his bill to recover payment of the mortgage debt. A decree was pronounced in 1879, and, among other things, ordered the defendant to pay what might be found due to the plaintiff for principal money, interest, and costs, forthwith after the making of the Master's report. The decree was carried into the Master's office and the reference proceeded with, but the defendant was not served with the Master's warrant, and the Master dispensed with service on the ground, as stated in the report, that the defendant was evading service, and could not be found. The plaintiff proceeded and took the accounts in the absence of the defendant, and the Master made his report on the 15th day of August, 1879. The defendant had in no way consented to the report being made during vacation. The judgment upon which the plaintiff based his right to examine the defendant as a judgment debtor was the combined effect of the above mentioned decree and report.

The defendant shewed cause to the application, and objected that there was no judgment, inasmuch as the report must be treated as a nullity, being made without consent during vacation. The plaintiff contended that the defendant not having moved to set aside the report, it was not open to him now to raise this objection, but that the report must be treated as regular until discharged.

G. M. Rae, for the plaintiff.

H. Cassels, for the defendant.

The referee refused the application with costs. The plaintiff thereupon appealed, and the appeal was argued by the same counsel, before the Chancellor, who delivered the following judgment :—

BOYD, C.—I have come to the conclusion that the report in this case being made by the Master during the long vacation in contravention of G. O. 425, requiring his office to be closed at that time, is as against the defendant, who had no notice of the proceedings in the Master's office, entirely null and void. This objection appears upon the face of the proceedings, and is in effect as fatal as if the report had been made *ex parte* on a Sunday or other non-juridical day: *Harrison v. Smith*, 9 B. & C. 243; *Mumford v. Hitchcock*, 9 Jur. N. S. 1200. The analogy of the common law practice is in favour of this conclusion: *Sharp v. Fox*, 1 H. & N. 496; *Trust & Loan Co. v. Dickson*, 7 U. C. L. J. N. S. 166; as is also the construction put upon the former G. O. No. iv. of June, 1853, in *Anderson v. Thorpe*, 12 Gr. 542. I therefore, on this ground, affirm the decision of the Referee, with costs.

TRAVISS V. BELL.

Production—Lunatic plaintiff.

Where a person of unsound mind sues by a next friend, the usual præcipe order that the plaintiff do produce is proper, and is sufficiently obeyed by the affidavit of the next friend.

[May 31, 1881.—*Boyd, C.*]

Motion to discharge an order to produce issued upon præcipe by the defendant against a lunatic plaintiff.

The Referee refused the motion with costs.

Ewart, for the appeal. No order to produce can be made in such a case, for the lunatic cannot comply with it and the Court has no power over the next friend, who is

not a party to the suit: G. O. No. 134; *Hardwick v. Wright*, 11 Jur. N. S. 297. Even if an order can be made that the plaintiff by his next friend do produce, the order must be in that form and not that the plaintiff do produce. An order that the plaintiff do produce means the plaintiff personally: *Ranger v. Great Western R. Co.* 4 DeG. & J. 74; *Republic of Liberia v. Imperial Bank L. R.* 16 Eq. 179; *Lindsay Petroleum Co. v. Pardee*, 6 P. R. 140; and in these cases special orders were issued requiring the corporation "by one of its officers" to file the usual affidavit.

The Court will not make an order which cannot be enforced, and it is admitted that neither the plaintiff nor his next friend can be obliged to comply with this order. In one case indeed, *The Princess of Wales v. The Earl of Liverpool*, 1 Swanst. 114, an order was made staying proceedings until the plaintiff, a married woman, did produce, but in a later case *Hardwick v. Wright*, (*ante*) this was said to have been "an extraordinary mode of doing justice", ordering documents to be produced in an indirect manner, although there was no authority to do it.

H. Cassels, contra. The plaintiff by coming into the Court as a suitor submits himself to the general practice and orders of the Court, and cannot ask relief from the Court against the defendant, without complying with the G. O. thereof, and with such special orders as the Court may make for the defendant's protection. The Court does not recognize the next friend as a party and has no control over him: *Hardwick v. Wright*, (*ante*) *Daniell's Pr.* 5th ed. p. 168. Even in the case of information by the Attorney-General the Court cannot compel production by the relator: *Attorney General v. Clapham*, 10 Hare App. 68. If therefore the plaintiff could not be ordered to produce, there would be a denial of justice. Moreover the plaintiff can comply with the order if he can move against it, as he is doing. This motion is by the lunatic, not the next friend. The defendant is and always has been willing to accept the next friend's affidavit as a compliance with the order, and it would be time enough for

the plaintiff to move against the order, if the defendant were to refuse the next friend's affidavit.

The case of a Corporation is not analogous. Formerly officers of a Corporation had to be made parties to a suit for the purpose of discovery. G. O. 63, renders that unnecessary, and provides for the examination of officers without their being parties, but does not provide for a preliminary production of documents by them. Hence a special order is required.

BOYD, C.—The practice as to production by the plaintiff at the instance of the defendant, by means of order and affidavit, is in substitution of the former procedure by which the defendant could obtain such discovery and information by means of a cross bill, the answer to which was the equivalent of the present affidavit. This form of affidavit has been carefully settled by the Judges, and although not obligatory, it is to be varied only in so far as may be necessary to meet unusual circumstances: *Daniell's Pr.*, vol. ii., p. 1679., 5th ed. The affidavit is said to be framed on the model of a carefully prepared answer to the interrogatories of a searching bill: *Rochdale Canal Co. v. King*, 15 Beav. 11. It is reasonable therefore to apply, for the disposal of this appeal, the analogy which obtains in regard to the swearing of answers by persons not *sui juris*. The books lay it down that when the answer is put in on behalf of an infant it is put in upon the oath of the person appointed his guardian. *Lord Redesdale*, 314; *Daniell's*, 153. In like manner it is said the answer of an idiot or lunatic is expressed to be made by his committee as his guardian, or by the person appointed his guardian by the Court to defend the suit. *Lord Redesdale*, 315; *Daniell's*, 161. It is also signed by the guardian or committee alone: *Daniell's*, 637. As in the case of infants, the guardian only swears to his belief in the truth of the defence when an oath is required: *Daniell's* 656. The Court will not permit the answer of a defendant represented to be in a state of incapacity to be received without

oath or signature. The proper course is in such a case to appoint a guardian to put in the answer : *Wilson v. Grace*, 14; *Attorney-General v. Waddington* 1 Mad. 178; *Micklethwaite v. Atkinson*, 1 Coll. C. C. 173.

It does not follow from the terms of the G. O. 134, that the affidavit must be made upon oath of the plaintiff himself. The view of Wood, V. C., as to this in *Attorney General v. East Dereham Exchange Co.*, 5 W. R. 486, cited by Mr. Ewart, was not followed in *Ranger v. Great Western R.*, 4 DeG. & J. 74, by the Lord Justices, who said that the provision in question was to be liberally construed. If a special application were to be made in this case the order should run that the plaintiff do make an affidavit of documents by the next friend; but to what advantage this step when the next friend has already put himself forward as the person and the only person to do this by instituting the suit, with himself as the next friend? He is answerable for the conduct of the proceedings, and if he delays to prosecute the cause by refusing or delaying to do what his position requires from him, he may be removed upon a proper application. I think the practice which has hitherto prevailed, as I understand, in the case of infant plaintiffs is applicable to cases of lunacy, and that it would be against the spirit of modern procedure to multiply special applications in obtaining orders like the present.

Here the person of unsound mind is suing by his next friend, who thus puts himself voluntarily forward as willing to answer on oath for the plaintiff in all matters requiring an oath. If the plaintiff is willing to accept the next friend's oath (as is stated at the bar), then I do not see what more is needed; nor do I see how the plaintiff is prejudiced by the order made. I think the Referee's order right.

Appeal discharged, with costs.

McDONALD v. WORTHINGTON.

Appeal—Money in Court—Interest on—Security for.

About \$40,000 was paid into Court during the progress of the suit. The decree dismissed the bill, and ordered payment of the money in Court to defendant.

The plaintiff appealed, and paid \$400 into Court as security for costs. Subsequently an order was made by the Referee staying payment out to the defendant, pending the appeal, upon the plaintiff giving additional security to the amount of \$200 for the difference between the legal interest and that allowed by the Court.

Held, on appeal that such order was not *ultra vires* nor unreasonable.

[June 2, 1881.—*Ferguson, V.C.*]

This was an appeal from an order made by the Referee in Chambers.

The facts sufficiently appear in the judgment.

A. M. McDonald, for the plaintiff appellant.

H. Cassels contra.

FERGUSON, V. C.—The decree, which was pronounced on the 25th day of April last, after declaring the rights of the parties under the articles of partnership in question to be as set forth in the answer of the defendant James Worthington, and dismissing the plaintiff's bill with costs, ordered the payment out of Court to the defendant James Worthington of a large sum of money that had apparently been paid into Court during the progress of the suit by one McCracken, under an order dated the 8th of February last.

From this decree the plaintiff appealed to the Court of Appeal, and on the 25th day of April last obtained an order permitting him to pay into Court the sum of \$400 as security for costs of the appeal, in lieu of filing the usual bond; such sum to be paid in within ten days from the date of the order.

On the 9th day of May last the plaintiff obtained the order now appealed from, ordering that the proceedings in the cause, so far as the moneys in Court to the credit of the cause were, by the decree, ordered to be paid out to the

defendant Worthington, be stayed for one month to enable the plaintiff to perfect his securities, and directing that upon the plaintiff furnishing security to the amount of \$200 for the difference between the interest allowed by this Court and legal interest that might accrue on the said moneys from the date of the issue of the decree till the cause shall be otherwise disposed of, and security for the costs of the defendant James Worthington, proceedings be stayed till judgment—by which, I suppose, judgment in the Court of Appeal is meant.

By this order this large sum of money, stated to be about \$40,000, is to remain in Court till the appeal is disposed of, if the plaintiff complies with the terms of the order. It will so remain in Court at the instance of the plaintiff and for no other purpose, so far as we can perceive, than for his security should his appeal be successful.

The present appeal is on the ground that the plaintiff should not have been required to give the security to the amount of \$200 mentioned in the order for the difference of interest above mentioned, his contention being, that he had the legal right to have the moneys detained in Court pending the appeal to the Court of Appeal, and that he should not be called upon to pay for the right which he already possessed, or to give the security therefor mentioned in the order. He referred to the cases *Hill v. Rutherford*, 1 Chy. Cham. 121 : *Barrs v. Fewkes*, L. R. 1 Eq. 292; and *Burdick. v. Garrick*, L. R. 5 Ch. App. 453. I have perused these cases and some others, and have arrived at the conclusion that the learned Referee had, in making the order in favour of the plaintiff to stay the proceedings, power to impose terms upon the plaintiff, and I cannot think that imposing this condition, as to his giving security for the difference of interest alluded to, was at all unreasonable. If the plaintiff succeeds in the Court of Appeal, and is found to be the owner of this large sum of money, he will only be bound to pay the difference of interest to himself. If, in fact, the money belongs to others and the plaintiff has it detained in Court for his security, the

judgment of the Court being at present against him, I do not think he should complain of the terms imposed and appealed against. In my opinion this appeal should be dismissed, with costs.

The plaintiff asked for two weeks time to perfect certain security for costs up to the hearing; this was not objected to, and I see no objection to the plaintiff having till, say, the 23rd instant for this purpose.

RE FERGUSON.

Infant—Custody of—Imbecility of parent.

While the undoubted natural right of a father to the custody and guardianship of his child is undisputed, and while the law imputes ability and inclination to the parent to perform his duty to his child, the right is yet founded upon his actual capacity to discharge this duty, and his superior claim to the custody of his offspring may be suspended while the incapacity lasts.

Under the circumstances of this case, stated below, the Court refused, on the application of the father, to take the child out of the custody of its grandmother and her brother-in-law.

[June 25, 1881.—*Boyd, C.*]

This was a petition by the father of an infant to take it out of the custody of its maternal grandmother and her brother-in-law (the respondents.)

The facts sufficiently appear in the judgment.

Hoyles, for the petitioner.

Symons, contra.

BOYD, C.—The father's right to the custody of his child is based upon that guardianship by nature which is recognized by the law. This guardianship the father may so modify by agreement or conduct that the Court will not assist him in recovering possession of his child, and will even

interfere against him. *Powell v. Cleaver*, 2 Bro. C. C. 499; *Lyons v. Blenkin*, Jac. 245. Commenting upon *Powell v. Cleaver*, Lord Eldon said, in *DeManeville v. DeManeville*, 10 Ves. 64: "Lord Thurlow's opinion went upon this, that the law imposed a duty upon parents; and in general gives them credit for ability and inclination to execute it. But that presumption, like all others, would fail in particular instances, and if an instance occurred in which the father was unable or unwilling to execute that duty, and farther, was proceeding against it, of necessity, the state must place somewhere a superintending power over those who cannot take care of themselves, and have not the benefit of that care which is presumed to be generally effectual." An outcome of this supervising power in such cases is seen in the statutes cited in the argument, wherein it is provided that no minor who is dependent on charity for support, shall be removed from the custody or control of any private person who is charitably taking care of the minor by the father, against the will of such private person, without an order for such removal from a Judge of one of the Superior Courts; and the Judge may refuse to grant an order unless satisfied that the removal will tend to the advantage and benefit of the minor. (R. S. O. c. 135, sec. 4, p. 1199.) This, in truth, seems to be the legislative recognition of doctrines previously enunciated by some of the Judges. The cases are collected in *Chambers on Infants*, p. 177, supporting the position that abandonment of their wards by guardians to want, or the charitable care of others, has been held a reason for refusing to deliver the infants to them at their caprice, and for restraining them from interfering with their custody by those who support them. Again it is laid down in the books that in cases of personal incapacity by lunacy or otherwise the Court will supersede a testamentary or other guardian in his authority, and that this disqualification, so long as it exists, attaches even to the father as natural guardian. *Chambers*, 177, 178; *Macpherson*, 90.

Upon the facts in the present application we have a con-

currence of circumstances which so much influence me that I have come to the conclusion to decline to interfere. After the death of the child's mother the father left him with its grandmother, who is living in comfortable circumstances with her brother-in-law, Mr. James Chambers, after whom the infant is named. It appears that the respondents were both much attached to the child (about three years old) and that he is cared for with the most affectionate regard. Mr. Chambers is 61 years of age, has no children. He has made his will largely in the child's favour, and he expresses his willingness to provide for and educate him in future.

On the other hand, the applicant about three years ago had a very severe attack of paralysis, which, in the opinion of the physician who attended him, has permanently affected his brain, and left him under incurable physical disabilities. One of his sides is paralysed—his speech is affected as well as his mind, so that as far as I can judge, he is not only crippled in body but enfeebled in mind to the verge of imbecility. The views of the Master at London, before whom the applicant was orally examined, and the opinion of the medical man, Dr. Woodruff, who was then present at the instance of the Master, strongly corroborate my conclusion. In fact after perusing that examination, I am by no means satisfied that the petitioner is competent to make the application, or that he understands what is going on in this matter. The mental alienation in this case presented a more forcible argument against entertaining the application than did the bodily absence from England of the parent in the case of *Ex parte Preston*, 5 D. & L. 233, S. C., 2 Bail C. R. 169.

In addition to this it is shewn that the father is entirely without means of support—that he is unable to work, that he has no house or home of his own, and that he has been supported for years, as well as his family, by the respondents. It is suggested that he has a wealthy father who wishes to have the child removed to Scotland, and that the intention of the applicant is to take the child there.

The applicant himself does not swear to this state of facts, even if he is capable of forming or entertaining such a scheme, and there is no evidence upon which I can judicially proceed, showing that these intentions exist, or that the father has or will have the means to convey the infant to Scotland, or that he will be cared for when he reaches that country. No scheme is presented to weigh for an instant with the present and prospective advantages of the child if left as he is, and the well-being of the child materially influences me in withholding any order which would interfere with the comfortable position and advantages which he now enjoys.

In short, the father is not able to care for himself, and is much less able to care for his child. His circumstances preclude him from commanding the assistance of others. His condition is such, that association with him will be likely to prejudicially affect the health and happiness of the child. His infirmities, physical and mental, however much to be deplored, disable him from discharging those duties and kindly offices which the law regards as the foundation whereon rests the parent's right to claim the custody of his offspring. While he is in this state, the Court will consider what is best for the interest of the child, and treat as suspended any superior claim as father which otherwise he might have to recover the possession of the infant.

NOTE.—On the delivery of the judgment, counsel for respondents requested that the petition be dismissed, as it would appear on the file as a pending proceeding if no order were made; whereupon an order was made dismissing the petition.—REP.

STINSON v. STINSON.

Trustee—Allowance to—Care of land—Evidence.

A Master has power to allow a lump sum to a trustee as his remuneration for the care and management of real estate, but to entitle him to such sum there ought to be evidence to enable the Court reasonably to see that the services for which such sum is asked have been rendered, and to make a proper allowance therefor. Where a Master fixed a sum, on evidence not sufficiently particular, the case, on appeal, was referred back to him, with leave to the trustee to give proper evidence. The trustee to pay the costs of the appeal and the additional costs in the Master's Office.

[June 30, 1881.—*Ferguson, V. C.*]

AN appeal from a judgment of the Master at Hamilton, dated the 17th of May, 1881.

The facts sufficiently appear in the judgment.

D. McCarthy, Q.C., with him Bruce, (Hamilton,) for the plaintiffs (appellants).

J. M. Gibson, for the defendant (respondent).

FERGUSON, V. C.—The only matter in dispute on this appeal is the item of \$15,400, allowed by the Master to the defendant James Stinson, the surviving trustee, under the last will of the late Thomas Stinson, for his time, care, and trouble in the management and supervision of the estate during the period from the 30th of December, 1870, to the 1st of May, 1874, the time at which a partition of the estate was made.

It appears by the report that during this period the trustees collected and got, in rents of the part of the estate situate in Canada the sum of \$38,040.06, and proceeds of sales of lands in Canada \$1,937.11, and of lands in the United States \$28,661.44, making in all \$68,638.61, and that these moneys were either paid out or applied upon former advances made by the trustees, there being a small balance against the plaintiffs, who are infants. And for the plaintiffs it is contended that the usual commission upon this sum, which would be a sum much less than the amount allowed by the Master, is all that should have been allowed.

It was stated that for a former period of three years the trustee had been allowed, without objection, the sum of \$15,000, but that during this former period an amount of about \$300,000 had been received and disbursed by the trustee, and counsel for the plaintiff contended that for this reason, if there were no other, the former allowance should not be a guide as to what is the proper allowance for the period now in question.

It also appears that the trustee was himself the owner of two-thirds of the estate, and that the interest of the plaintiffs in this suit is in respect to the one-third of the sum of \$15,400,

It is contended on behalf of the respondent, the trustee, that he is entitled to a reasonable compensation for his care, skill, time, and trouble, expended in regard to the estate during the period referred to, and that the usual commission mentioned above would not be at all an adequate amount.

It appears also by statement of counsel, who referred to former reports of the Master, made in this suit, that the estate was, before the partition, very large, and embraced real estate of the value of between \$800,000 and \$900,000, and that some of these lands were situate in Canada, some in or near the city of Chicago, some in the State of Minnesota, and some in the State of Wisconsin, there being over \$200,000 worth in Chicago, and over \$400,000 worth in Minnesota; and it was not denied that these lands required certain care and attention, and that a very large portion of them remained unsold at the expiration of the period in question.

The Master, at the request of the solicitor for the defendant Stinson, the trustee, certified specially that in fixing the allowance to the trustee he had regard to the peculiar circumstances of those portions of the estate situated in Chicago, the State of Minnesota, and the State of Wisconsin, and the special skill necessary for the judicious and proper management thereof, and that he also had regard to the allowances that are made to persons occupying, in the

United States, positions of trust similar to that filled by the defendant the trustee, with reference to the estate in question. The Master also, at the request of the plaintiffs' solicitor, certified that he had fixed the allowance to the trustee at \$15,400, on the first day of August, 1880; and further, that the plaintiffs' solicitor having subsequently intimated that he intended to appeal against the allowance of the said amount, he permitted the solicitor for the trustee to produce further evidence in reference to the same, which further evidence was accordingly given and confirmed his (the Master's) opinion previously announced, as to the proper sum to be allowed.

The words of the statute, R. S. O. ch. 107, sec. 41, are, "*a fair and reasonable allowance for his care, pains, and trouble, and his time expended in and about the executorship, trusteeship, or administration of the estate,*"

* * * And as I understand, it is not denied that the Master had power to fix a sum to be allowed without adopting the ordinary mode of allowing a certain percentage by way of commission upon the amount of moneys received and paid in the management of the estate. The authorities show clearly that the Master had such power, and the question is whether or not the Master allowed an extravagant or unreasonable sum.

There was much evidence tending to show that during the period in question it would not have been prudent to dispose of the property (although the evidence was not all to that effect), and counsel for the trustee presented, with great force, I thought, a case of all the property remaining unsold, and the trustee receiving nothing for his care of the estate by reason of there being no money on which to allow a commission.

Having examined all the authorities referred to, and many more, and read the evidence, I think, with some care, I am of the opinion that the ordinary commission upon the moneys received and paid by the trustee during the period would not be an adequate allowance to him, and I do not think that in this case that is the proper way of estimating

the allowance ; and it was not contended that the trustee had done or left undone anything that should disentitle him to such an allowance as the law contemplates.

In considering this case, I was much impressed by the language of a learned Judge, in the case *Wagstaff v. Lowerre*, 23 Barb. (N. Y.) 224, decided under a statute very similar to ours. He said " It seems to have been supposed that the trustee in this case is limited to his commissions on that part of the estate which has become personal property, and this doubtless has arisen from assuming such to be the intent of the statute in the case of executors and administrators. * * * The compensation is given him for his care and management of the estate, and not for the simple act of receiving and paying out. And I am unable to see why the trustee should be restricted to his commissions upon the sums of money he receives and pays out, and the personal property which he transfers. The reasons for his compensation, in my judgment, apply with greater force even in regard to real estate than personal. The responsibility and difficulty of managing a trust estate consisting of stocks, bonds, and mortgages, are far less than that consisting of unproductive real estate lying in the suburbs of a large and growing city. This kind of property has been subject to the prevailing system of local improvements, by opening streets and avenues, regulating and paving streets, constructing sewers, and other operations. It has always been subject to annual taxation, and constant watchfulness is required to save property thus circumstanced from total loss and confiscation."

This language was used by the learned Judge in regard to an estate, the real property of which was situated in the suburbs of one city. In the present case the real property was situated in the suburbs of several cities ; and, although the statute under which the case was decided may not be of precisely the same meaning as our statute, I cannot but think that it expresses the correct idea here.

Yet, while I am of the opinion above stated, I cannot entirely agree with the master in thinking that the evidence

given by the trustee as to the necessary care and management by him of the estate during the period in question, is sufficient on which to award him the allowance made. It must be borne in mind that the plaintiffs are infants, and that no implication arises out of the former dealings with the estate or the allowances made, and not objected to, and the case of the trustee for the allowance asked must be reasonably proved. With all respect and deference, I am of the opinion that this has not been done. The evidence of the trustee himself does not, as I think, apply itself with sufficient particularity to the situation of the several properties, and the items of care and management, &c., and the necessity for the same, during the particular period in question; and I do not think that this allowance ought to be made upon his and the evidence of the several gentlemen from the United States, given in the general way, in which it is, showing, apparently, in the main, only two things: that Mr. Stinson was well qualified to manage the estate, and so far as they were aware that he was diligent in attending to it; and that the large salaries mentioned by them were paid in that country for the management and sale of estates.

I do not mean to say that the trustee should be called upon to prove with all particularity every item of his services to the estate and the value thereof. This might be considered unreasonable under the circumstances, but there ought, I think, to be evidence from which the Court would be able reasonably to see that the care, management, &c., for which the allowance is asked was undergone by the trustee during the period in question in respect of the plaintiffs—of course then in conjunction with his own estate—and which would enable the Court to place a reasonable value upon the same, so as to be able to make a proper allowance. I do not think this evidence has been given. If I were called upon to make such an allowance upon the evidence before me, I do not see how I could do it in a manner satisfactory to myself. It may be that the trustee has not preserved the necessary material to enable

him to adduce the evidence that I indicate as necessary. If he has not that will be his misfortune. During the argument, counsel for the trustee asked a reference back rather than that I should dispose of the case should my opinion be adverse to his contention. To this counsel for the plaintiffs objected; but, after considering the matter as carefully as I can, I think my duty is to refer the case back to the Master, with leave to the defendant, the trustee, to give such further evidence as he may be advised. The costs of this appeal and any additional costs occasioned in the Master's office, will be paid by the defendant Stinson, the trustee.

RE IDINGTON AND MICKLE.

Costs—Taxation—Proper forum—Solicitor and agent—Settled account—G. O. 640.

Bills of costs between solicitor and client should *prima facie* be referred for taxation to the master of the county in which the work was done. Charges by a solicitor who acted as agent for the principal solicitor are subject to taxation though the principal receives a commission. Upon such taxation a master should without special direction regard any settlement arrived at between the solicitors.

[June 22, 1881.—*Boyd, C.*]

Mr. *H. Cassels*, on behalf of Mr. J. A. Morton, a solicitor, presented a petition to refer a bill of Messrs. Idington & Mickle against him for certain agency work to the Taxing Officer at Toronto.

It appeared from the material used that Mr. Morton had employed Messrs. Idington & Mickle as his agents in Stratford in connection with a partition suit pending before the Master there, under G. O. 640: that before the work was fully completed and the charges fully made Mr. Morton called on Messrs. Idington & Mickle at their office, when one of the partners shewed him the entries in the dockets to that date, which he examined: that subsequently when the work was done they completed their charges, and inserted some items as amounts paid to their Toronto agents during the progress of the matter, which afterwards proved to be erroneous, when their agent's account was received: that Mr. Morton had been apportioned \$79 as commission, and the amount of the agency account was \$49, and that a suit had been commenced in the Division Court to recover the amount.

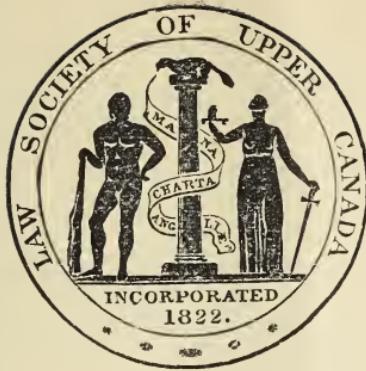
H. Cassels cited *Campbell v. Campbell*, 8 P. R. 159; *Dodge v. Clapp*, 8 P. R. 388; R. S. O. ch. 140, sec. 33, and contended that the Taxing Officer was the proper officer to tax the bill.

Hoyles, for Messrs. Idington & Mickle. This Act was passed to change former practice—*Re Solicitors*, 7 P. R. 263—also, suit having been brought, the Court should not interfere. Leave to amend the bill, if necessary, should be given: *Re B. and S. Attorneys, &c.*, 6 P. R. 18; *Re Martin*, 7 P. R. 90. A portion of the account having been settled, this part at least should not be disturbed on the taxation.

Cassels, in reply. The bill of costs being rendered does not treat the matter as settled up to any date, but all the items are rendered, and the Court will not allow parties to deduct items they wish to withdraw, if they are over-charges.

BOYD, C.—*Re Fitch* 2 Chy. Cham. R, shows that even before the Act 34 Vic. ch. 12 orders were made, in some cases, to tax solicitor and client bills in the office of the local master. A contrary practice was established by that case, but the Legislature changed this in 1871, by 34 Vic. c. 12, sec. 13, which is sec. 33 of the Revised Statutes relating to attorneys: “The bill shall now be referred to the proper officer in the county in which any of the business charged for was done.” All the work here was done in the County of Perth, *prima facie* the reference should be to Stratford. All circumstances of commission and expense point in the same direction, and I think the reference should be there.

No special direction need be given as to part of the claim being settled between the parties. The Master must regard this upon the taxation. The solicitors may be allowed to amend their bill or substitute a new one upon terms of paying all costs incurred by the applicant up to the present time. *Re Carven*, 3 Beav. 438; *Re Chambers*, 34 Beav. 177; *Re Davy*, 1 C. L. J., N. S. 213; *Re Martin*, 7 P. R. 90-93. If a new bill is delivered the applicant to be allowed to pay that without proceeding further with this application, if so advised. If no new bill be delivered costs of application to abide result of taxation.



ABSTRACT OF BALANCE SHEET, 1881.

RECEIPTS.

Certificate and Term Fees	\$16435 75
Less Fees returned	121 75
	————— \$16314 00
Notice Fees	761 00
Attorneys' Examination Fees.....	6730 00
Less Fees returned	840 00
	————— 5890 00
Students' Admission Fees	9189 75
Less Fees returned	808 00
	————— 8381 75
Call Fees	12310 00
Less Fees returned	2210 00
	————— 10100 00
Interest and Dividends	4034 95
Government payment for Heating, Lighting, &c....	4250 00
Balance	21278 39
	—————
	\$71010 09

EXPENDITURE.

REPORTING :—

Salaries	\$7400 00
Postages.....	531 20
Printing	6762 13
Notes for "Law Journal"	347 50
	<hr/>
	15040 83
Less Reports sold.....	563 44
	<hr/>
	\$14477 39

EXAMINATIONS :—

Salaries	2400 00
Scholarships	2220 00
Printing and Stationery	491 51
Advertising	33 90
Engrossing Diplomas and Certificates \$5.24 ; Dies and Medals \$589 34.	594 58
Examiners for Matriculation	339 00
Prizes \$50 ; Law Journal acct. \$35..	85 00
	<hr/>
	6163 99
Less Fees received for Petitions	74 00
	<hr/>
	6089 99

LIBRARY :—

Books, binding, and repairs.....	3625 49
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GENERAL EXPENSES :—

Salaries—Secretary, Sub-Treasurer, and Librarian	2000 00
Assistants.....	967 27
House-Keeper.....	216 00
	<hr/>
	3183 27

LIGHTING, HEATING, WATER, AND INSURANCE :—

Engineer and Assistant	560 00
Gas \$383.16 ; Water \$943 63.....	1326 79
Insurance \$585.33; Weighing coal \$10	595 33
Fuel.....	2949 28
Repairs to Apparatus	170 40
Carting coal and cutting wood	152 49
	<hr/>
	5754 29

Brought forward \$33130 43

GROUNDS :—

Gardener and Assistant	400 00
Tools and Seed	6 35
Cartage \$4.75 ; Labour \$193.02	197 77
Snow Cleaning	37 70
Repairing Sidewalks	44 89
	686 71

SUNDRIES :—

Scrutineers \$360 ; Auditor \$100.....	460 00
Stationery and Printing	219 12
Advertising \$143.90 ; Postage \$85.83	229 73
Repairs \$46.18; Petty charges \$32.42	78 60
Law Costs	863 92
Term Lunches \$529.75 ; Clocks \$10.	539 75
County Library Aid.....	868 00
Telegraph Operator	158 04
Glass \$5.80 ; Cleaning windows and brass work \$48.95	54 75
Dominion Telegraph Company	75 00
Resumé	30 00
Premium Guarantee Company	12 00
Ice \$10 ; Oiling floor \$10; Detector \$2	22 00
Address <i>Re</i> Chief Justice Moss	25 00
Locks, Matting, &c.	27 03
Painting Benchers' Rooms	41 55
Bell Telephone Company.....	45 08
17 copies Tariff for Judicature Act..	17 50
Langley & Burke's account.....	300 00
Portrait Chief Justice Osgoode	260 00
	4327 07

Expended on new Building in 1881.....

38144 21
32865 88

\$71010 09

A DIGEST
OF
ALL THE REPORTED CASES
DECIDED IN
COMMON LAW AND CHANCERY CHAMBERS.

FROM THE 3RD MARCH, 1879, TO THE 22ND JUNE, 1881.

ABATEMENT.

See PLEADING.

ABSCONDING DEBTOR.

1. *Order for writ—Debt due to the Crown—Affidavit of debt—Waiver.]*—In an action at the suit of the Crown, an order was made for a writ of attachment against defendant as an absconding debtor. Service of the writ was accepted by his attorney, who entered an appearance to the writ :

Held, that this was a useless proceeding, and that defendant should have put in special bail.

On an application to set aside the writ, *Held*, that any defect in the materials on which it was granted, might be supplied by the affidavits used on such application.

Held, also, that the forfeiture of a recognizance to appear was a debt sufficient to support the application for an attachment under the Absconding Debtors' Act, and that such

writ may be granted at the suit of the Crown, where the defendant absconds to avoid being arrested for a felony.

Held, also, that the amount for which special bail is to be put in need not be mentioned in the order for the writ.

Held, also, that the affidavit of debt, which in this case was made by the County Crown Attorney, was sufficient.

Held, also, that defendant was precluded by having accepted service of the writ, with knowledge of these alleged irregularities, and delayed moving until after the time for pleading had expired. *Regina v. Stewart*, 297.

2. *Attachment—Absconding debtor—Entitling affidavits—Evidence of intention.]*—The affidavits upon which the order for a writ of attachment against an absconding debtor was issued, were not styled in any Court, although sworn before a commission for taking affidavits in the Queen's Bench, who appended to his

signature the words, "A Com. in B. R., &c."

Held, that the affidavits were sufficient: *Ellerby v. Walton*, 2 P. R. 147, followed; *Hart v. Ruttan*, 23 C. P. 613, not followed.

If a creditor has reasonable grounds for inferring his debtor's intention to defraud his creditors, a writ of attachment will not be set aside. *Scott v. Mitchell*, 518.

ABSTRACT.

Registrar's Abstract.]—See QUIETING TITLES, 8.

ACCOUNT.

See MORTGAGE, 10, 11.—*EVIDENCE*, 4.

ADMINISTRATION.

1. *Powers of Masters under G. O. 638].—An administration order was granted by the Master at Chatham under G. O. 638, while a suit was pending for the construction of the will of the testator, in which administration was asked, and in which the executors were charged with misconduct, and before a year had elapsed since the death of the testator. Heywood v. Sivewright et al.*, 79.

2. *Administration—G.O. 638, who entitled to.]—A creditor of an intestate served notice of motion for an administration order under G. O. 638, on D.'s widow and administratrix. The widow then served a similar notice upon the heirs of her husband, and filed affidavits alleging a deficiency of the personality to pay debts: that creditors were suing, and also*

filed a consent of the adult heirs to an order in her favour.

The Master at Chatham granted an administration order to the widow, and, on appeal, PROUDFOOT, V. C., held that he was right. *Re Draggon*, 330.

3. *Partition—Creditors—Costs allowed.]—An order for partition or sale was made under the recent G. O. 640, by the Master at London, of the estate of one M., deceased. In proceeding under that order the Master advertised for creditors, and M. & M. sent in a claim for obtaining letters of administration and for defending an action in the Court of C. P., brought by W. M., a defendant in this suit, and entitled to a share of the estate v. the administratrix. The Master allowed the claim, and W. M. appealed, on the ground that they were not entitled to prove as creditors in this cause. Held, that she was justified in defending the suit, and the appeal was dismissed. McKay v. McKay*, 334.

4. *Administration suit—Commission in lieu of costs—G. O. 643.]—Where in administration suit property sold subject to a mortgage: Held, that the commission in lieu of costs should be upon the amount realized by the sale—that is, upon the actual value of the interest of the intestate in the property in question, not upon the whole purchase money. Re McColl—McColl v. McColl*, 480.

5. *Administration—Suretyship—Executrix de son tort—Practice.]—It is competent to the Court, on a proper case being made, to appoint or dispense with an administrator ad litem, and then to direct an account, but to justify such an order the nature and amount of the personal estate must be shewn.*

When a claim against a deceased's estate is one arising out of a contract of suretyship, the Court will not, unless by consent of all parties, make an administration decree except on a bill filed.

Semble, that administration of an estate will not be ordered by the Court where no legal personal representative has been appointed or dispensed with, though an executrix *de son tort* is before the Court. *Re Colton, Fisher v. Colton*, 542.

See REFEREE, 1, 2.

ADVERTISEMENT.

Advertisement for creditors.]—See PARTITION, 6.

ALIEN.

See SERVICE, 7.

ALIMONY.

See Costs, 12.

AMENDMENT.

See HUSBAND AND WIFE, 1.

APPEAL.

1. *Certificate of Court of Appeal*—*Proceedings thereon—Appeal Act, sec. 14.]—Held*, that a certificate of the Court of Appeal may be acted on in the Court below, without issuing a rule upon such certificate. *McArthur v. The Corporation of the Township of Southwold*, 27.

2. *Stay of proceedings in Master's office—Practice.]—Where a decree*

had been made declaring the plaintiff entitled to insurance moneys, and directing a reference to ascertain the amount and payment forthwith after the making of the report, an order staying proceedings in the Master's office was refused pending an appeal from the decree. *Butler v. Standard Fire Ins. Co.*, 41.

3. *Security for costs of appeal—Bond—Execution, stay of.]—The bond for \$400 given, under the provisions of sec. 26, ch. 38, R. S. O., is a security for the costs of appeal only; in order to stay execution for the costs of the Court below, further security must be given.* *Powell v. Peck*, 85.

4. *Costs on appeal—Sum in gross in lieu of—Practice.]—An order allowing \$400 to be paid into Court by the appellant in lieu of a bond will be granted *ex parte*.* *Connolly v. O'Reilly*, 159.

5. *Time to appeal—Practice.]—Where a solicitor's clerk, through forgetfulness, neglected to set down an appeal as required by G. O. 642, the Referee refused to extend time for appealing; and*

On appeal, SPRAGGE, C., upheld his ruling. *Dunnard v. McLeod*, 343.

See ARBITRATION AND AWARD, 2—*CRIMINAL LAW*, 4—*MASTER'S REPORT*, 3.

ARBITRATION AND AWARD.

1. *Reference—Facts in dispute.]—Held*, on an application to refer to arbitration an action on the common counts, that where a material question of fact was in dispute, the case was not a proper one in which to

make an order for compulsory reference. *Gannon v. Gibb*, 115.

2. *Arbitration—Award—Submission—Appeal—R. S. O. ch. 50, sec. 191.]*—Where a voluntary submission to arbitration contained a provision that the agreement might be enlarged the time for making an award, although the same was not made a rule of Court, and that the Court might be moved to set aside or refer back the award.

Held, that this conferred no right of appeal under R. S. O. ch. 50, sec. 191, which, under sec. 205, could only be conferred by the terms of the submission. *In re Township of York v. Wilson*, 313.

3. *Reference under Municipal Act R. S. O., ch. 174, sec. 377—Enlarging time.]*—The Court has power to enlarge the time for making an award, although the same has not been made “within one month after the appointment of the third arbitrator,” as required by sec. 377 of the Municipal Act R. S. O. ch. 174.

The general enactments relating to arbitration apply to awards under the Municipal Act.

In extending the time in this case the matters referred were remitted to such persons as the Court should appoint under the Municipal Act.

In extending the time in this case the matters referred were remitted to such persons as the court should appoint under the Municipal Act sec. 385. *In re the City of Toronto v. Scott*, 318.

policy of our law to permit a foreigner to follow another into Ontario, and arrest him for a debt contracted abroad, is limited to cases in which the debtor is here on temporary business, and is about to return to his own country. And where the debtor has absconded from his own country to Ontario, and does not intend returning, or intends to go to some other country, the creditor may follow and arrest him here upon a *ca. re*. An application to set aside an arrest the Judge should not enquire into the particular form of the action, if satisfied that a cause of action exists. *Butler et al. v. Rosenfeldt, Sweetzer et al. v. Rosenfeldt*, 175.

2. *Seduction—Arrest under ca. sa.—Indigent debtor—Allowance—Clerk of Crown, jurisdiction of.]*—In an action for seduction, the defendant was arrested under a writ of *ca. re*, and judgment having been entered against him, a *ca. sa.* was issued, and he was surrendered by his bail to the custody of the sheriff.

Held, that the defendant was not in custody as a debtor, or on execution, but on *mesne* process as a wrongdoer, and that he was not entitled to an order for payment of a weekly allowance under the Indigent Debtors' Act, R. S. O. ch. 69.

Held, that it is within the power of the Clerk of the Crown in Chambers to make an order for the payment of a weekly allowance to a debtor, under the above Act, where it can legally be made.

Semblé, that a Judge has power to extend the time for appealing against the order of the Clerk of the Crown in Chambers, on an application made after four days from the making of the order. *Wheatly v. Sharp*, 189.

ARREST.

1. *Arrest—Foreigner—Temporary residence—Cause of action.]*—The general rule that it is against the

3. *Ca. sa.—Render by bail—Supersedeas—Discharge—Reg. Gen. H. T. 26, Geo. III.*]—The defendant was arrested under a *ca. sa.* and afterwards admitted to bail. The trial was in the vacation before Michaelmas Term, and the render in the vacation after that term. The plaintiff having omitted to charge the defendant in execution during Hilary Term :

Held, on an application for a *supersedeas*, that the render in Michaelmas vacation related back to the preceding term, which should count as one of the two terms within which the plaintiff must charge the defendant in execution, under *Reg. Gen. H. T. 26 Geo. III.* The defendant was therefore discharged. *Golding v. Mackie*, 237.

4. *Writ of ne exeat—Power of the bail to surrender the principal—Rights of parties as to money deposited in lieu of bail.*]—1. The sureties on a statutory bail bond under a writ of *ne exeat Provincia* have no power to surrender their principal as at common law. An application by sureties for discharge from a bond and for repayment of the money paid to the sheriff as collateral security, was refused.

2. Where a party is entitled to an assignment of a bond, and to realize it for his own benefit, his rights are the same in regard to money deposited; and where in an alimony suit the statutory bond under a writ of *ne exeat* has been given, the plaintiff is entitled to have the moneys deposited as collateral security therefor, paid into Court, and applied in discharging arrears of alimony. *Richardson v. Richardson*, 274.

5. *Writ of arrest.*]—A writ of arrest will not be granted against the pur-

chaser in a suit for specific performance, unless it be shewn by affidavit that the vendor's lien is insufficient. *Nelson v. Dafoe*, 332.

6. *Married woman—Commitment of, under R. S. O. ch. 50—Liability to arrest.*]—A married woman, a judgment debtor, who refuses to attend and be examined as to her estate and effects, or refuses to disclose her property, or to give satisfactory answers to questions under R. S. O. ch. 50, secs. 304, 305, may be committed for disobedience of the statute, notwithstanding the R. S. O. ch. 67, sec. 3.

The order for commitment in such case is not *mesne* or *final* process, but punishment for disobedience of the statute. *Quære*, as to the liability of a married woman to arrest. *Metropolitan Loan and Savings Co. v. Mara et ux.*, 355.

7. *Arrest—Attachment—Costs—R. S. O. ch. 50, sec. 343.*]—Defendant was arrested and held to bail for a debt alleged by plaintiff to be \$704, but the plaintiff recovered only \$489. As to \$80 which the plaintiff failed to recover it was held, on the facts stated below, that he had no reasonable ground for believing defendant to be liable, and he abandoned it at the trial, but as to the other portion, for which he failed, he had reasonable ground :

Held, that defendant was entitled to tax his costs of defence against the plaintiff under R. S. O. ch. 50, sec. 343. *Porritt v. Fraser*, 430.

8. *Arrest—Habeas Corpus—Foreign offence, 6 & 7 Vic ch. 34 Imp.*]—The prisoner was arrested in Toronto, upon information contained in a telegram from England, charging him with having committed a felony in

that country, and stating that a warrant had been issued there for his arrest:

Held, that a person cannot, under the Imperial Act 6 & 7 Vic. ch. 34, legally be arrested or detained here for an offence committed out of Canada, unless upon a warrant issued where the offence was committed, and endorsed by a Judge of a Superior Court in this country.

Such warrant must disclose a felony according to the law of this country, and *Semble*, that the expression "felony, to wit, larceny," is insufficient.

The prisoner was therefore discharged. *Regina v. McHolme*, 452.

9. *Capias—Arrest—Discharge of prisoner.*] — Where defendant was arrested on a *Ca. Re.* and it was doubtful whether the debt was actually due or not, the Court refused to discharge the defendant, although the Judge who granted the order for the writ would not have done so, if all the facts had been before him. *Willett v. Brown*, 468.

10. *Bail—Ca. sa.—Surrender—Copy of bail-piece.*] — Where a defendant is arrested by a sheriff under a *ca. re.*, and after verdict is surrendered by his bail to the same sheriff upon an action being commenced against them, the sheriff is not entitled to a copy of the bail-piece before receiving the prisoner into custody; and where such refusal was given, the sheriff was compelled to pay the costs of an application to stay proceedings, and an order was made to extend the time for surrender. *Grierson v. Corbett*, 517.

See SUPERSEDEAS.

ASSESSMENT OF DAMAGES.

See INTERLOCUTORY JUDGMENT.

ASSIGNMENT.

See SCIRE FACIAS AND REVIVOR.

ATTACHMENT.

Attachment—Attorney—Affidavit—Garnishee, disputing liability—Prohibition.] — The affidavit on which to obtain an attaching order may be made by the attorney of the judgment creditor, or by a partner of the attorney.

Semble, that proceedings on such order could not be prohibited on the ground that it was founded on a defective affidavit, that being a mere matter of practice.

A debt is garnishable where it consists of money due under an award and decree of the Court of Chancery, although the full amount is not ascertained by reason of the costs not having been taxed. When the amount in such a case is finally ascertained, execution may be issued against the garnishee, although he still disputes his liability, and the Judge is not bound to direct an issue. *In re Sato v. Hubbard*, 445.

See PRODUCTION, 2—ARREST, 1, 7—Costs, 14—ABSCONDING DEBTOR, 2.

ATTORNEY AND SOLICITOR.

1. *Moneys for investment—Loan to the attorney—Reference to the Master.*] — The fact as to whether moneys collected by an attorney had been afterwards loaned to him by

the client, was disputed; but an undertaking was produced, signed by the attorney, to the effect that he held the moneys for investment.

Held, that if the transaction was afterwards turned into a loan to the attorney, he must be prepared with the clearest evidence of the change in the relation, otherwise the usual order against the attorney must be made; and in this case the evidence was held to be insufficient.

Held, that where an order directing a reference to the Master has been made in Chambers, in such a case, and the reference completed under it, an application for relief therefrom must be made to the Court. *In Re an Attorney*, 102.

2. *Lien of solicitor—Fund in Court recovered by suit.]*—A defendant's solicitor as a plaintiff's solicitor may have a lien for costs on a fund in Court.

A bill was filed by a purchaser against the vendor for rescission or specific performance of a contract for sale of lands in the county of Simcoe, made the 12th day of October, 1870, and registered in July, 1875, and by the decree made in October, 1876, the plaintiffs were ordered to pay certain overdue purchase money. C., a creditor of the defendant, having placed a *fi. fa.* lands in the hands of the sheriff of Simcoe in December, 1878, obtained a stop order in January, 1879, against the purchase money in Court. The defendant's solicitor claimed a prior lien for costs of this suit, but had obtained no stop order:

Held, on the application of the defendants' solicitors for payment of the fund to them, that their lien had priority.

Part of the fund in Court was a balance of purchase money paid into

Court by the plaintiff in March, 1879, pursuant to the decree on further directions made in October, 1878. C. seeking to attach this balance, in addition to his stop order obtained in January, 1877, placed a *fi. fa.* goods in the hands of the sheriff of York in February, 1879:—*Held*, that as to this balance the solicitors' lien had also priority. *Wardell v. Trenouth*, 142.

3. *Attorney—Costs—Mortgage.]*—L., being the holder of a mortgage upon which an instalment of interest was due, instructed his attorneys "to take legal proceedings on the securities unless the interest was paid on the 12th April." The mortgagor called on the 12th April, and told the attorneys that he intended to pay off the mortgage shortly, and hoped no costs would be incurred. On the 15th April the attorneys issued a writ of ejectment, and prepared notice of sale, and served them on the mortgagor on 23rd April, when he called to pay off the mortgage. They also refused to take the principal money.

Held, that the attorneys had no authority to collect the principal, and that they were entitled to the costs of the ejectment suit, but to no other costs whatever. *In re Flint & Jellett, Attorneys*, 361.

4. *Attorney and client—Costs—Taxation—Delay—Special circumstances.]*—Where a client applies for taxation of an attorney's bill after the expiration of a year from its delivery, he should shew such special circumstances as would have justified a reasonable man in not previously seeking a taxation, or that he was prevented by some unavoidable cause.

Where judgment had been signed against the client in an action on the

bill during the pendency of negotiations for a settlement, this was held a sufficient reason for directing a taxation after the year. *Patullo et al. v. Church*, 363.

5. *Attachment—Attorney's lien—Costs.*]—In garnishee proceedings a Court of Law will, as against the attaching creditor, protect an attorney's lien for costs of the action or suit in which or by which the debt attached has been recovered, where the garnishee has notice of the lien.

A Court of Equity will restrain a creditor who has obtained an attaching order at law from enforcing it against a fund recovered by means of a suit in Equity, to the prejudice of the attorney's lien for costs in that suit.

The lien extends only to the costs incurred in the particular suit or proceeding, and not to the attorney's general costs against the client in other matters. *Canadian Bank of Commerce v. Crouch*, 437.

See BANKRUPTCY AND INSOLVENCY—COSTS, 6, 10, 15, 16.

BAIL-PIECE.

See ARREST, 10.

BANKRUPTCY AND INSOLVENCY.

1. *Costs—Attorney.*]—The plaintiff, an attorney, was the official assignee of an insolvent estate. He brought an action on behalf of the estate and used his own name as the attorney on the record. The plaintiff obtained a verdict. *Held*, that under section 32 of the Insolvent

Act of 1875, he was entitled to tax disbursements only against the defendants. *Agnew v. Ross*, 67.

2. *Insolvent plaintiff—Security for costs.*]—The repeal of the Insolvent Act does not affect any insolvent whose estate has vested in the assignee prior to the appeal. *Cooper v. Kirkpatrick*, 248.

3. *Costs—Proving in insolvency for—Estoppel.*]—The plaintiff filed his bill on the 14th March, 1874. On the 31st of the same month, an attachment in insolvency was issued by the defendant against the plaintiff.

The decree dismissed the plaintiff's bill, with costs, in October, 1874. Defendant proved against the estate for the costs of the Chancery suit, but did not take his dividend from the assignee in insolvency, and took no further steps for the recovery of his claim till after the order for discharge of the plaintiff (25th May, 1877,) when he issued execution. On the application of the plaintiff,

SPRAGGE, C., refused to set aside the execution, holding that defendants were entitled to issue it, and that the proving against the estate for the costs of suit when it was not legally provable, did not operate as an estoppel *in pais* between the plaintiff and defendant. *Stevenson v. Sexsmith*, 286.

BIDDING.

At sale.]—*See SALE OF LAND BY ORDER OF THE COURT.*

BONDHOLDERS.

See RAILWAYS.

CAPIAS.

See ARREST, 9.

CERTIORARI.

See CRIMINAL LAW.

CHATTEL MORTGAGE.

See INSPECTION OF DOCUMENTS.

CHEQUE.

See DIVISION COURT.

COMMISSION.

1. *Evidence—Further examination of witness.*]—Where a witness who had been previously examined under a commission, stated on affidavit that he had further evidence to give to explain or correct his former evidence.—*Held*, a new commission should issue to further examine him, and that in such case he should be considered as a witness for the party who desires to so re-examine him.

Held, also, that strong suspicion of a depraved motive in the witness for desiring to be re-examined, was not a sufficient ground upon which to resist the application. *Rogers v. Manning*, 2.

2. *Foreign commission—Cross interrogatories—Where filed—G. O. 221—Instructions to commissioners.*]—When a foreign commission issues on the Master's certificate, under G. O. 221, cross-interrogatories should be filed in the office of Clerk of Records and Writs; and where they were filed by a defendant in the Master's office instead, and notice of filing

given, but by accident the commission was forwarded without them, an application made on the return of the commission executed to suppress the depositions was refused, with costs.

1. Where the instructions directed that the depositions must be subscribed by the witness, and a witness could not write, the commissioner certified to that fact, and the interpreter and commissioner signed their names.—*Held*, sufficient.

2. On the facts stated in the judgment: *Held*, that the interpreter was not such an agent or correspondent of the complainant as would justify the suppression of the depositions on that ground.

3. The commissioner was an Italian, and the instructions to him were in English: *Held*, no objection, as it did not appear that the commissioner was unacquainted with the English language.

4. That it did not appear that the commissioner took down the evidence.—*Held*, immaterial, under the instructions set out below.

5. The depositions of the claimant were taken by one commissioner, and those of a witness by another.

Held, also immaterial.

On appeal, PROUDFOOT, V.C., affirmed the Master's rulings above stated. *Darling v. Darling*, 391.

3. *Foreign commission—What must be shown on application for.*]—On an application for a foreign commission to examine a witness who is travelling, it should be shown that he will remain at the place to which the commission is directed a sufficient time to allow of its due execution. *Singer v. Williams's Manufacturing Co.*, 483.

See EVIDENCE, 2, 5.

COMMISSION UNDER G. O.
643.

See MASTER'S REPORT, 2—ADMINISTRATION, 4—COSTS, 11—PARTITION, 2, 3.

COMPENSATION.

See SALE OF LAND BY ORDER OF THE COURT, 7.

CONVICTION.

See CRIMINAL LAW.

COPIES OF DOCUMENTS.

See SALE OF LAND BY ORDER OF THE COURT, 8.

CORPORATION.

See SERVICE, 4.

COSTS.

1. *Security for costs—Insolvent plaintiff.]*—The defendant was aware of the insolvency of the plaintiff before the action was commenced, but did not apply for security for costs until after issue was joined, alleging that he was not before aware that the plaintiff had not obtained his discharge.

Held, that the defendant had waived his right to security. *Robertson v. McMaster*, 14.

2. *Security for costs—Trustee—Assignee in Insolvency.]*—An assignee in insolvency *bona fide* suing in discharge of his duty as such assignee, will not be required to give security for costs on the ground that he is

without means, and not beneficially interested in the suit. *Vars v. Gould*, 31.

3. *Foreign judgment—Liquidated amount.]*—The plaintiff sued the defendant on a foreign judgment for \$240, and specially endorsed this amount upon the writ of summons. He obtained judgment in default of appearance.

Held, that the foreign judgment was not a liquidated or ascertained amount within the meaning of R. S. O. ch. 50, sec. 153, and that the plaintiff was entitled to Superior Court costs. *Davidson v. Cameron*, 61.

4. *Taxation of costs—Third party clause—Taxation of mortgagees' costs by subsequent encumbrancers.]*—First mortgagees sold under a power in their mortgage, and paid their solicitors' costs of sale.

A subsequent encumbrancer obtained from the Referee, on motion, an order for the taxation of the mortgagees' costs.

This order was reversed on appeal, on the ground that the mortgagees could not tax the bill, and the mortgagor stood in their place. An objection that the order should have been obtained on petition, not notice, was disregarded. *Re Macdonald, Macdonald & Marsh*, 88.

5. *Sheriff's fees—Taxation—Revision.]*—Where a sheriff's fees have been taxed before a Deputy Clerk of the Crown under R. S. O. ch. 66, sec. 48, a revision of such taxation cannot take place before the principal Clerk of the Crown, but the Court may refer the bill back to the same Deputy Clerk for a revision of the taxation, where it appears that items have been improperly allowed. *Hay v. Drake*, 120.

6. *Attorney and client—Taxation of costs—Order to pay.*]—Where an order is made for taxation of an attorney's bill, as between attorney and client, under the R. S. O. ch. 140, sec. 49, Common Law Court has no power here, as it has in England, under the 6 and 7 Vic. ch. 73, sec. 43 to make a summary order for payment of the amount found due from the client, except by consent. *In re A. B. and C. D. Attorneys*, 126.

7. *Execution Act—Sheriff's costs—Taxation.*]—Held, that a sheriff's bill of fees may be taxed on notice under sec. 48 of the Execution Act, R. S. O., ch. 66, either at Toronto or in the sheriff's own county, as the party taxing may elect. *Dominion Type Founding Co. v. Nagle*, 174.

8. *Dismissal of bill before answer—Defendant's costs.*]—A bill had been filed but not served, and was subsequently dismissed with costs by the plaintiff. It appeared that, though no answer had been drawn, the defendant's solicitor had received instructions to defend, some two months before the dismissal of the bill.

Held, that defendant was entitled to tax instructions, and the costs of the taxation. *Bissett v. Strachan*, 211.

9. *Cost—Term motion—Interlocutory costs—Sett off.*]—The costs of a motion in term are interlocutory costs, and the party to whom they are awarded is entitled to have them set off against the judgment of the opposite party obtained in the same cause.

Held, also, that the costs of a motion made after judgment might be treated as interlocutory, for the purposes of a set-off under Reg. Gen. 52. *Young v. Hobson*, 253.

10. *Taxation—Charge for attendance on—G. O. 608.*]—A Master or a single Judge has no discretion to allow a solicitor more than \$1 per hour for attendance on the taxation of a bill of costs, either between solicitor and client, or party and party: the tariff being fixed at that rate by G. O. 608. *Re Totten*, 385.

11. *Commission under G. O. 643—How apportioned—Objections—Practice.*]—In partition and administration suits, the commission in lieu of costs should be divided into equal fractional parts, and the parts allotted to the solicitors in proportion to the amount of work done by and the responsibility imposed upon them.

Objection to the commission allotted may be raised on a motion for distribution without previous notice of appeal being given. *Dodge v. Clapp*, 388.

12. *Alimony—Security for costs—Nominal plaintiff—Waiver.*]—A petition by the defendant to reduce the amount of alimony allowed in the suit, came on to be heard on the 5th of October, when counsel for the plaintiff appeared and procured an enlargement for two weeks to answer the defendant's affidavits, and on the same day demanded and received copies of them. On the 19th October, the counsel appeared and obtained a further enlargement for two weeks, but before the time expired applied for an order for security for costs, on the grounds stated below.

Held, without expressing an opinion on the merits, that the plaintiff had waived her right, (if any) to such security. *Knowlton v. Knowlton*, 400.

13. *Mortgage—Costs of sale under power—Summary taxation of—42 Vic. ch. 20, sec. 11. O.*]—42 Vic. ch.

20, sec. 11, O., authorizing the taxation of a mortgagee's costs by any party interested, without any order to tax, applies to mortgages executed before the passing of the Act. *Ferguson v. English and Scottish Investment Co.*, 404.

14. *Judgment debtor—Attachment—Costs—R. S. O. ch. 50, sec. 304.]*—*Held*, that a judgment creditor, whose judgment is for costs only, cannot examine his judgment debtor under R. S. O. ch. 50, sec. 304, nor garnish debts due to him.

A judgment creditor in such a case may examine his judgment debtor under R. S. O. ch. 49, sec. 17. *Ghent v. McColl*, 428.

15. *Costs—Solicitor and client—Travelling expenses—Special attendance in M.O.—G. O. 608.]*—Where costs as between solicitor and client were to be paid by the plaintiff to the defendant, and where it appeared that the defendant's solicitor had at the request of his client, made in good faith and on reasonable grounds travelled from Sarnia to Toronto, to attend on the examination of the plaintiff on the bill :

Held, on appeal from the Master, that the defendant could tax against the plaintiff a sum of \$60, paid to defendant's solicitor for two days services and travelling expenses. *Gough v. Park*, 492.

16. *Costs—Taxation—Proper forum—Solicitor and agent—Settled account—G. O. 640.]*—Bills of costs between solicitor and client should *prima facie* be referred for taxation to the master of the county in which the work was done.

Charges by a solicitor who acted as agent for the principal solicitor, are subject to taxation though the prin-

cipal receives a commission. Upon such taxation a master should without special direction regard any settlement arrived at between the solicitors. *Re Idington v Mickle*, 566.

See MORTGAGE, 1, 2, 3, 14—INTERPLEADER, 2—BANKRUPTCY AND INSOLVENCY—APPEAL, 3—SERVICE, 5—ADMINISTRATION, 3—COUNTY COURT, EQUITY SIDE—ARREST.

COUNTY COURT.

Jurisdiction.]—See INTERPLEADER, 1, 5—PROHIBITION, 2.

COUNTY COURT, EQUITY SIDE.

County Court ; equity side—Injunction—Counsel fees before Master sitting for Judge.]—The County Court on its equity side had power to grant an injunction in any case coming within its jurisdiction. The fact of the title to land coming in question did not oust the jurisdiction of the County Court on its equity side. Where evidence taken before the Master sitting for a Judge was entered in the decree as having been taken in Court, the same fees were taxed to counsel before the Master as before a Judge. *Rae v. Trim*, 405.

2. *Jurisdiction of County Courts on the equity side—Costs on the lower scale.]*—Where a cause was properly within the equity jurisdiction of a County Court, but the defendants resided in a different county from that in which the land in question was situated, the costs were ordered to be taxed on the higher scale. *Doubledee v. Credit Valley R. W. Co.*, 416.

COURT.

See CRIMINAL LAW—APPEAL, 1.

CRIMINAL LAW.

1. *County Judges' Criminal Court—Power to imprison—Indictment.]* The prisoner was convicted before a County Judges' Criminal Court on a charge of receiving stolen goods, knowing them to have been feloniously stolen, and was sentenced to imprisonment. On an application for a *habeas corpus*—*Held*, that the Court was a Court of Record, and that under R. S. O. ch. 70, sec. 1, there was therefore no right to the writ.

Held, also, that the Judge had power to imprison.

Held, also, that if an indictment for stealing certain articles, be sustainable as to some of the articles stolen, the conviction is good, although the indictment may contain any number of articles as to which an indictment could not be sustained. *Regina v. St. Denis*, 16.

2. *Malicious wounding—Misdemeanour—Form of conviction—Punishment.]*—On motion to discharge prisoner on *habeas corpus* on conviction before a Police Magistrate, the conviction charged that the prisoner did “unlawfully and maliciously cut and wound one Mary Kelly, with intent then and there to do her grievous bodily harm,”

Held, that, the addition of the words, “with intent to do grievous bodily harm,” did not vitiate the conviction, and that the prisoner might be lawfully convicted of the statutory misdemeanour of malicious wounding.

Held, also, that imprisonment at

hard labour for a year was properly awarded under 38 Vic. ch. 47. *Regina v. Boucher*, 20.

3. *Certiorari—Conviction—Several offences—32 & 33 Vic. ch. 31, sec. 25, D.]*—The defendant was convicted before a magistrate, for that he “did in or about the month of June, 1880, on various occasions,” commit the offence charged in the information ; and a fine was inflicted “for his said offence :”

Held, that the conviction was bad, under 32 & 33 Vic. ch. 21, sec. 25 D., as shewing the commission of more than one offence. *Regina v. Clennan*, 418.

4. *Conviction—Appeal—Prohibition.]*—*Held*, that the prosecutor of a complaint cannot appeal from the order of a magistrate dismissing the complaint ; as by R. S. O. ch. 74, sec. 4, the practice of appealing in such a case is assimilated to that under Dom. Stat. 33 Vic. ch. 47, which confines the right of appeal to the defendant. A prohibition was therefore ordered, but without costs, as the objection to the jurisdiction had not been taken in the Court below. *In re Murphy v. Cornish*, 420.

DECLARATION.

See PLEADING, 2.

DEFAMATION.

1. *Libel—Plea of justification—Particulars.]*—In an action of libel the plaintiff alleged that the defendant had accused him in a newspaper article of having made false returns to the Government, in his business of distiller. In this the defendant pleaded justification.

Held, that the plaintiff was entitled to particulars of the defence intended to be set up under this plea. *Corcoran v. Robb*, 49.

2. *Pleading — Libel — Apology — Payment into Court.*]—In an action for libel the plea of *not guilty* was held inconsistent with a plea of apology and payment into Court, and was ordered to be struck out. *Doyle v. Owen Sound Printing Co.*, 69.

DEPUTY CLERK OF THE CROWN.

Examination — Fees — Stamps — Deputy Clerk of Crown.]—Where an examination of parties pursuant to R. S. O. ch. 50, sec. 161, takes place before a Deputy Clerk of the Crown, though not designated in the order as acting in his official capacity, the fees for such examination are payable in stamps, and not in money. *Denmark v. McConaghy*, 136.

DISCHARGE OF MORTGAGE

See MORTGAGE, 15.

DISCLAIMER.

See EJECTMENT, 1.

DISMISSAL OF BILL.

Dismissing bill for want of prosecution — Non-production.]—In a suit to set aside a conveyance of the equity of redemption in certain lands as fraudulent as against creditors, one sitting of the Court having been lost, a defendant, the grantee of the equity of redemption, moved to dismiss the bill for want of prosecution.

More than two weeks before the sittings commenced, the plaintiff's solicitors were notified to file a replication and proceed to a hearing, but did not do so. The excuses offered by the plaintiff were, that the defendant was a material witness, and was absent prior to the hearing, and that the property had been sold under a power of sale contained in one of the mortgages, and little or no surplus remained after paying the mortgagees. It appeared that no effort had been made to find the defendant in order to subpoena him as a witness at the hearing, and that the sale of the land did not take place until a month after the sittings at which the cause might have heard.

Held, that the delay was not excused, and the bill should be dismissed.

Held, also, that failure of the defendant to comply with an order to produce did not, under the circumstances of the case, deprive him of the right to move to dismiss.

Semble, that a plaintiff cannot, in answer to a motion to dismiss, ask to have the bill dismissed without costs, but must make a substantive motion for that purpose. *Elliott v. Gardiner*, 409.

DIVISION COURT.

1. *Prohibition — Jurisdiction — Abandonment of excess.*]—The plaintiff sued the defendant in the Division Court for \$100, and endorsed on the summons as particulars a promissory note for \$125.

Held, that the plaintiff might at the trial abandon in his particulars the excess above \$100, so as to bring the case within Division Court jurisdiction. *In re Stogdale and Wilson*, 5.

2. Prohibition—Cheque—Jurisdiction.]—The defendant, who resided within the limits of the Tenth Division Court of the County of York, drew a cheque in the plaintiff's favour, within the limits of the First Division Court of the same county, upon a bank situate in the Tenth Division. The cheque having been dishonoured, the plaintiff sued upon it in the First Division Court. *Held*, that the action was improperly brought there, and that a summons for a prohibition thereto, on the ground of want of jurisdiction, must be made absolute. *King v. Farrell*, 119.

3. Prohibition—Jurisdiction—Letter.]—The defendant residing at Port Elgin, by letter, instructed the plaintiff, an attorney at Toronto, to take certain legal proceedings. The plaintiff having performed these services brought the present suit in a Division Court at Toronto, to recover his fees.

Held, that the cause of action partly arose in each place, and that a prohibition should issue. *In re Hague v. Dalrymple*, 183.

4. Garnishee—Jurisdiction—Prohibition.]—A plaintiff in a Division Court, proceeding against a primary debtor and a garnishee in a Court which would not have jurisdiction against the primary debtor alone, must prove a garnishable debt in the hands of the garnishee; otherwise, a prohibition will lie.

A garnishee is not a defendant within the meaning of the R. S. O. ch. 47, sec. 62. *In re Holland v. Wallace et al.*, 186.

5. Division Court—Prohibition—Substitution of defendant.]—A witness in a Division Court suit having

admitted that he was the real debtor, the plaintiff was allowed, under D. C. Rule 115, to substitute the witness as a defendant and obtain a judgment against him.

Held, on an application for a prohibition, that the Division Court Judge had the power to do this. *In re Henny et al. v. Scott*, 251.

6. Division Court—Prohibition—Jurisdiction—Proof of claim.]—The plaintiff residing within the limits of the Ninth Division Court of Wentworth, sued in that Court two defendants, who both resided in St. Catharines, on a cause of action which partly arose in St. Catharines. One defendant put in a notice of defence disputing the claim and the jurisdiction of the Court. At the trial neither defendant appeared, and the Division Court Judge gave judgment for the plaintiff without requiring any proof of the claim, in accordance, it was said, with the practice in that county.

Held, that proof of the claim should have been given, and a prohibition was ordered with costs.

Held, also, that an application for a new trial by the defendant who had given the notice was no waiver of his right to object to the jurisdiction; and that the other defendant could not prejudice such right by having given no notice of defence. *In re Evans v. Sutton et al.*, 367.

7. Division Court—Garnishment—Prohibition—Jurisdiction]—The garnishees held over \$500 belonging to the defendant. The plaintiff claimed the right to attach this money in a Division Court, to the extent of his judgment.

Held, that the jurisdiction of Division Courts in garnishee proceedings is limited to debts within the

proper competence of such Courts to try, and a prohibition was therefore ordered.

Held, also, that under 43 Vic. ch. 8, O., secs. 10 and 14, notice of intention to dispute the jurisdiction of a Division Court is only necessary when the cause of action being within Division Court jurisdiction, the suit is brought in the wrong Court. *In re Mead v. Creary*, 374.

8. *Division Courts Act, 1880—Jurisdiction—Interest—Promissory note.]*—Plaintiff sued on a promissory note for \$73.14, payable with interest at 7 per cent; the principal and interest together amounting to \$103.44 :

Held, that under the Division Courts Act, 1880, the amount of fixed legal damages in the nature of interest for non-payment of a promissory note need not be under the signature of defendant, and the above claim could therefore be recovered in a Division Court. *McCracken v. Creswick*, 501.

9. *Division Court—Suit on note—Production of the note.]*—In a suit in a Division Court upon a negotiable instrument, where the summons is specially endorsed, and defendant does not dispute the claim, the plaintiff is entitled to enter judgment for the amount claimed, without the production or filing of such instrument. *In re Drinkwater v. Clarridge*, 504.

10. *Division Court—Jurisdiction.]*—Plaintiff having paid a note of which he and defendant were joint makers, for \$169, but which the plaintiff signed as a surety only :

Held, that plaintiff could not sue defendant in a Division Court for the money so paid, the amount not

being ascertained by the signature of defendant.

A summons for prohibition was made absolute without costs, there being no meritorious defence. *Kinsey v. Roche*, 515.

See PROHIBITION—(Division Court Bond)—See QUIETING TITLES, I.

DOMICILE.

See TRUSTEES AND EXECUTORS, 2.

DOWER.

1. *Dower—Ont. S. 42 Vic., ch. 22.]*—H. being possessed of some lands executed mortgages of them, some of which were given to secure unpaid purchase money and others to secure the repayment of money lent to H. The wife of the mortgagor had joined in the mortgages to bar dower.

H. having died intestate :

Held, on sale of the lands under decree, directing a sum in gross, in lieu of dower, to be paid to the widow, that she was entitled to dower out of the whole amount realized from the sale, after deducting therefrom the amount of the mortgages given by H. to secure unpaid purchase money but not of the other mortgages. *Re Hopkins, Barnes v. Hopkins*, 160.

2. *Mortgage—42 Vic. ch. 22, O.]*—The defendant, a judgment creditor being the owner of lands subject to mortgages in which his wife had joined, sold the same, and allowed her to receive a part of the purchase money for her dower. On an application for a *ca sa*.

Held, that she was not entitled to anything for dower, and the 42 Vic.

ch. 22, sec. 2, O., does not apply to a case of voluntary sale by a husband. *Calvert v. Black*, 255.

See SCIRE FACIAS AND REVIVOR—SALE OF LAND BY ORDER OF THE COURT, 4, 5.

EJECTMENT.

1. *Disclaimer—Possession—Defendants, striking out.]*—An application by defendants in an action of ejectment to have their names struck out on the ground that they were not in possession at or subsequent to the issue of the writ, and disclaim any interest in the land, is regularly made before appearance, although the application would be entertained after appearance where the justice of the case required it. But where two defendants applied after appearance to have their names struck out, and the Court, from the facts, entertained a doubt as to the good faith of these defendants, the application was dismissed, with costs. *Anglo Canadian Mortgage Co. v. Cotter et al.*, 111.

2. *Ejectment—Equitable issue—Jury notice—R. S. O. ch. 50, sec. 257.]*—In ejectment where equitable issues are raised under R. S. O. ch. 50, sec. 257, the issues must be tried without a jury. *Bryan v. Mitchell*, 302.

See SERVICE, 1.

ELECTION.

See PARLIAMENT.

ENLARGEMENT.

See RULE NISI.

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EVIDENCE.

1. *Examination before master—Right to be present at—Discretion of master—R. S. O. 50, sec. 260.]*—Upon the examination of two defendants before a Master, he, at the request of their solicitor, directed two other defendants present on behalf of the plaintiff, who was too ill to attend, to withdraw, but they refused.

The Master thereupon declined to proceed with the examination.

Held, on appeal, that the Master should have allowed one defendant to be present on behalf of the plaintiff, if he was satisfied that this was required for the proper representation of the plaintiff's interest, but by analogy to R. S. O. ch. 50, sec. 260, he might require such defendant to be examined first, if he was to be called as a witness. *Sivewright v. Sivewright et al.*, 81.

2. *Impertinence—Striking out Interrogatories—Jurisdiction of Referee—Practice.]*—The Referee made an order striking out as impertinent certain interrogatories to be administered to a witness under a commission.

Held, on appeal, that the Referee has no jurisdiction to strike out interrogatories for impertinence. The proper course is, for the witness to demur to the impertinent question. *Williams v. Corby*, 83.

3. *Examination of parties—Order to re-examine.]*—A party having before judgment examined another party to the cause adverse in interest under R. S. O. ch. 50, sec. 156, is not entitled to a re-examination of the same party except under the most special circumstances. *Thorborn v. Brown*, 114.

4. *Taking accounts in Master's office—Evidence admissible.]*—Two partners in (T. & R. O'Neill) executed two mortgagees in favour of J. W. W. assigned the mortgages to H., by way of derivative mortgage, on the 21st March, 1877. In January, 1877, the O'Neill's became insolvent, and the plaintiff, their assignee, filed a bill to redeem these mortgages. After decree W. became insolvent, and the suit was revived in the name of P. & P., his assignees, in his stead.

On the reference, H. claimed so much of the amount due on the original mortgages as would satisfy his derivative mortgage, and P. claimed the remainder. Against their claims the plaintiff filed two similar surcharges, one against H. and the other against P. & P. In support of his surcharges the plaintiff offered the following evidence :

1. A certified copy of the evidence taken in an action at law brought by the plaintiff against W., in which he recovered judgment, in the spring of 1879, for a considerable sum as the unpaid purchase money for goods sold by the O'Neill's to W. A certified copy of the judgment of the Court of Common Pleas on a rule for a new trial, and an exemplification of the judgment roll.

2. The books of the firm of T. & R. O'Neill.

3. The books of W.

4. A certified copy of the depositions of W. taken in this suit before the Master at Cobourg prior to the making of the decree.

Held. 1. That the evidence of the common law action could not be read as against either H. or P. & P., but that the evidence of W. himself might possibly be received against his assignees P. & P., as admissions made by

him, and that the exemplification of the judgment might be used against his assignees to shew an indebtedness from W. to the plaintiff as assignee of the O'Neill's on a particular account.

3. That the books of T. & R. O'Neill, could not be used against either W.'s assignees or H.

3. That the entries in the books of W. were evidence as admissions against his assignees, and as to transactions before the 21st March, 1877, against H., to shew the state of the account at the date of the assignment.

4. That the depositions of W. before the Master at Cobourg, like his answer in the suit, could be read against himself, and under the later authorities against H. also. *Court v. Holland—ex parte Holland and Walsh*, 219.

5. *Commission—Viva voce examination.]*—Where a commission was issued to England to take evidence in a case involving many intricate questions of fact, the evidence was ordered to be taken on *viva voce* questions, instead of upon interrogatories. *Watson et al. v. McDonald*, 354.

See COMMISSION, 13—PARLIAMENT—SERVICE, 2—PRODUCTION, 2—ABSCONDING DEBTOR, 1, 2—EXTRADITION.

EXAMINATION.

1. *Costs—Examination of parties—Breach of promise of marriage.]*—The parties in an action for breach of promise of marriage not being competent or compellable witnesses for each other, the plaintiff was not allowed the costs of the preliminary examination of the defendant, under

R. S. O. ch. 50, sec. 156. But the plaintiff's costs of his own examination were allowed, as this took place at the instance of the defendant. *Woodman v. Blair*, 179.

2. *Examination of parties—Verdict—Effect of an order to examine.]*—Where an order to examine a party to a suit has been granted before the trial, such examination cannot be had after the trial has taken place; and it was so held where the verdict rendered at the trial was a nominal verdict only, subject to a reference to arbitration, *Shelly v. Hussey*, 250.

3. *Examination of a co-defendant adverse in interest—Construction of G. O. 128—Costs.]*—A defendant whose interest is identical with that of the plaintiff, is a party adverse in interest to his co-defendant, and may be examined by his co-defendant under G. O. 138. When the plaintiff's solicitor is present at such examination it may be read at the hearing against the plaintiff. The successful defendant will be allowed the costs of such examination. *Moore v. Boyd*, 413.

See SERVICE, 2—EVIDENCE, 3—DEPUTY CLERK OF THE CROWN.

EXECUTION.

Execution—Mutual Insurance Co.—R. S. O. 151, sec. 61.]—Under R. S. O. ch. 161, sec. 61, writs of execution against a Mutual Insurance Company cannot be issued until after the lapse of three months from the recovery of judgment.

Held, that this section applies equally in the case of a policy issued on the cash principle, and of one upon the premium note system. *Lount v. Canada Farmers' Insurance Co.*, 433.

EXECUTORS.

See TRUSTEES AND EXECUTORS.

Executrix de son tort.]—See ADMINISTRATION, 5.

EXTRADITION.

Forgery—Evidence.]—A prisoner was committed for extradition to the United States on a charge of having forged a resolution of a city council to the issue of bonds, of having forged a bond of said city, and of uttering the same:

Held, on an application for his discharge, that the resolution being an essential preliminary to the issue of the bond, and the bond being an instrument which might be the subject of forgery, although not executed in strict accordance with the code of the state in which the bond was issued, there was a *prima facie* case made out against the prisoner, and that he should be remanded as to the charge of forgery.

Held, also, that the evidence against the prisoner of having uttered a forged instrument not being otherwise sufficient, the Court could not look at an indictment against him found by the Grand Jury of an American Criminal Court. *Regina v. Hovey*, 345.

FEES.

See DEPUTY CLERK OF THE CROWN.

FIRE.

1. *Contract of sale—Loss after execution of.]*—A purchaser at a sale under decree signed the usual contract to purchase and paid the deposit.

The next day the buildings on the property were burned down.

Held, that the loss must fall on the purchaser, as the interest contracted for passed to him on the signing of the contract. *Stephenson v. Bain*, 166.

2. Contract of sale—Loss after execution of.]—A purchaser at a sale under decree signed the usual contract to purchase, and paid the deposit. The next day the buildings on the property were burned down.

Held, on appeal, reversing the decision of the Referee, *ante p. 166*, that the loss would not fall on the purchaser, as the interest contracted for did not vest in him till the report on sale was confirmed. *Stephenson v. Bain*, 258.

FIXTURES.

Trade fixtures as between mortgagor and mortgagee—Subsequent encumbrancers — Proper parties in Master's office.]—Certain machinery was placed in a factory on the premises in question, some before and some after the execution of the mortgage to the plaintiffs in 1874. The mortgagor (the defendant) had no interest in any of the machinery at the date of the mortgage to the plaintiffs, having previously sold out to one Abel; but afterwards he became solely entitled to all of it, and he then executed a chattel mortgage of the same to the Parry Sound Lumber Company. On the reference under decree obtained by plaintiffs the Master made the lumber company parties as subsequent encumbrancers.

Held, (assuming the machinery, or some portions of it, to be trade fixtures removable as between landlord and tenant,) that the machinery (or

such portion aforesaid) when acquired by the mortgagor, would go to increase the plaintiffs' security; and that therefore the Master was right in making the lumber company parties as subsequent encumbrancers.

Further, that there appeared no good reason why the plaintiffs having purchased and taken an assignment of a mortgage made by defendant in 1869, were not entitled under that to have the greater part if not all machinery added to their security. *London and Canadian Loan Co. v. Pulford*, 150.

FORECLOSURE.

See MORTGAGE, 1, 3, 6, 16, 17.

FRAUDULENT CONVEYANCE.

County Court—Issue directed to Superior Court—Fraudulent conveyance—Jurisdiction.]—An issue had been directed from a County Court to one of the Superior Court, under R. S. O. ch. 49, sec. 12, to try whether a conveyance of certain lands by a judgment debtor was fraudulent, and the County Court had defined the issue to be tried, and the time and place of trial. The plaintiff, in pursuance of the direction, prepared and delivered the issue to the defendant, the grantee in the conveyance, who did not return it; and the plaintiff, after the time for trial had elapsed, applied to the Superior Court for an order absolute for sale of the land.

Held, such order could be made only in the County Court, whence the issue had been directed, and that the Superior Court could only try the issue, and could make no final disposition of the matter.

Held, also, that the application was not in any event well founded, as the plaintiff should have proceeded with the trial of the issue.

Quere, as to the granting of a new trial, or reviewing the verdict upon such an issue. *Merchants' Bank v. Brooker*, 133.

GARNISHEE.

See DIVISION COURT, 7—ATTORNEY AND SOLICITOR, 5—ATTACHMENT, 1.

HABEAS CORPUS.

See CRIMINAL LAW, 1—ARREST, 8.

HUSBAND AND WIFE.

1. *Married woman—Next friend—Practice.*]—When a married woman filed a bill in respect of property acquired by her after the passing of 35 Vic. ch. 16 (the 2nd day of March, 1872), she is not, though married before that date, required to sue by a next friend.

Leave was given to strike out the name of a next friend, where one had been named by mistake, and an order had been obtained requiring security for costs. *Shelly v. Goring*, 36.

2. *Married woman—Next friend Rev. Stat. ch. 125, sec. 4—Practice.*]—Where a married woman, married before the passing of 35 Vic. ch. 16, (2nd March, 1872), files a bill in respect of property, whether acquired before or after that date, she is required to sue by a next friend. *Shelly v. Goring*, 8 Pr. Rep. 36, referred to. *Godfrey v. Harrison*, 272.

See TENANCY BY THE CURTESY.

IMPROVEMENTS.

Improvements—Will.]—The Court under special circumstances, allowed money to be expended in improvements on a certain property of a testator who had directed by his will that the rents and profits of all his property should be expended in payment of debts, and in the support of his wife and children until the youngest child should come of age. *Re Bender*, 399.

INFANT.

1. *Custody of illegitimate child—Religion.*]—A mother, some months before her death, consigned her illegitimate child, 7 years of age, whose reputed father was dead, to the custody of a Protestant institution, she being a Roman Catholic. Immediately before her death she signed a paper expressing her desire to have her child delivered up for nurture to a Roman Catholic institution.

Held, that the Court had not power to compel the delivery up of the child, and the express wish of the mother was no ground for interference. *In re Smith, an Infant*, 23.

2. *Custody of—Verbal agreement.*]—The mother of a child six years of age, whose father was dead, having re-married, delivered up the child to a cousin for nurture and adoption. No written agreement was made, and the parties differed as to the verbal understanding.

Held, that the Court, looking only to the best interests of the child, should refuse to direct the redelivery to the mother. The fact of the mother having re-married, and having children by both husbands, and that the child would be under the custody

of a stepfather, was regarded as one ground for the non-interference of the Court. *In re Martha Jane Scott*, 58.

3. *Appointment of guardian—Past maintenance.*] — It was provided in a will, (1.) That the interest on investments should be paid by trustees for the benefit of certain infants to their guardian appointed by the will, or to such guardian, except the father of the infants, as the Court should appoint; and (2.) That if the father applied to the Court, the trustees were to allow the interest to accumulate and be invested till the infants became of age. The guardian named ceased to act, and after the lapse of two years (notice having been given to the father), it was ordered, (1.) That the petitioner, the aunt of the infants, with whom they had lived since the death of their mother, the testatrix, should be appointed guardian; (2.) That the petitioner should be paid for the past maintenance of the infants. *Re Heywood, Infants*, 292.

4. *Infant — Custody of — Imbecility of parent.*] — While the undoubted natural right of a father to the custody and guardianship of his child is undisputed, and while the law imputes ability and inclination to the parent to perform his duty to his child, the right is yet founded upon his actual capacity to discharge this duty, and his superior claim to the custody of his offspring may be suspended while the incapacity lasts.

Under the circumstances of this case, stated below, the Court refused, on the application of the father, to take the child out of the custody of its grandmother and her brother-in-law. *Re Ferguson*, 556.

See LIMITATIONS, STATUTE OF MORTGAGE, 17.

INJUNCTION.

See COUNTY COURT, EQUITY SIDE.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY—COSTS, 2.

INSPECTION OF DOCUMENTS.

Mortgage.] — An action was brought upon the covenant contained in a chattel mortgage which covered goods in the United States, and which was not registered in Ontario.

Held, on an application for inspection of the mortgage, that the Court had power, irrespective of the Common Law Procedure Act, to order inspection of the mortgage in question, or of any document sued upon. *Emmens v. Middlemiss*, 320.

INTEREST.

See MORTGAGE, 7, 18—VERDICT.

INTERLOCUTORY JUDGMENT.

Judgment—Notice of trial—Assessment of damages.] — *Held*, that in an action commenced by a writ not specially endorsed, where the defendant does not plead to the declaration, the plaintiff must sign interlocutory judgment against the defendant before he is in a position to serve notice of trial and assessment of damage. *Fenwick v. Donohue*, 116.

INTERPLEADER.

1. *Superior and County Court—Jurisdiction.*]—*Held*, that in case of interpleader by a sheriff between two claimants, one a plaintiff in a Superior Court suit, the other a plaintiff in a County Court suit, the application for an interpleader order was properly made in the Superior Court, although the seizure was made under the County Court writ before the Superior Court writ came into the sheriff's hands. *Strange v. Toronto Telegraph Co.*, 1.

2. *County Court writs—Costs.*]—Several executions from different County Courts having been placed in the sheriff's hands :

Held, on an interpleader application to the Superior Court, that all costs, including those of the sheriff, should be taxed on the County Court scale. *Masuret v. Lansdell*, 57.

3. *Interpleader—County Court writs—Costs.*]—In an interpleader matter where several writs were placed in the sheriff's hands, one from a County Court, the other from the Superior Courts, a successful claimant was held entitled to Superior Court costs, as against a County Court execution creditor.

Held, also, that where all the writs are from County Courts, the sheriff is entitled to County Court costs only; but a successful party to the issue is entitled to Superior Court costs.

Masuret v. Lansdell, ante p. 57. remarked upon and modified. *Phipps v. Beamer*, 181.

4. *Sheriff—Laches.*]—At the instance of a sheriff, an interpleader order was granted and issues tried to determine the rights of certain claimants to goods seized by him in execution. Previously to the order

being granted, the landlord of the premises laid claim to the goods, which claim the sheriff did not mention when applying for the order.

Held, that after the trial of the issues, the sheriff was not entitled to a second interpleader to test the landlord's claim, as this should have been disposed of on the first application. *Clarke v. Farrell*, 234.

5. *Costs.*]—A sheriff having made a seizure of goods under a writ of execution, which seizure the execution creditor had not specially directed, and a claimant to the goods having appeared, the execution creditor refused to allow the sheriff to withdraw. On the return of an interpleader summons obtained by the sheriff, the execution creditor abandoned his claim :

Held, that the execution creditor might abandon at that stage of the proceedings without costs, and no order was made as to the costs of the sheriff. *Canadian Bank of Commerce v. Tasker*, 351.

INTERROGATORIES.

See EVIDENCE, 2.

INTEREST.

See SALE OF LAND BY ORDER OF THE COURT.

JUDGMENT.

See SCIRE FACIAS AND REVIVOR.

JUDGMENT DEBTOR.

See ARREST, 1 — *SERVICE*, 5 — *COSTS*, 14.

JURISDICTION.

See REFEREE, 12—PROHIBITION, 1—COSTS, 3—EVIDENCE, 2—PARTITION 5—COUNTY COURT, EQUITY SIDE.

JURY.

1. *Juror—Withdrawal of—Determination of cause.]*—The withdrawal of a juror at the trial has the effect of concluding the suit, and with it, of determining the whole cause of action. *Flake v. Clapp*, 62.

2. *Similiter—Jury notice—Joiner.]*—The plaintiff joined issue upon defendant's pleas, and at the same time filed a *similiter*, without a jury notice, for the defendant. Afterwards the defendant filed a second *similiter*, and with it a jury notice. *Held*, that defendant should have filed a jury notice with his pleas; that the first *similiter* was good, that the second was unnecessary, and must, together with the jury notice, be struck out as bad. *Hyde v. Casmea*, 137.

See EJECTMENT, 2.

JURY NOTICE.

Similiter—Notice of trial—Chancery sittings.]—With his joinder of issue, the plaintiff served notice of trial for the Chancery sittings. Defendant afterwards served a *similiter* and jury notice.

Held, that the *similiter* and jury notice were good, and that the notice of trial must be set aside. *McLaren v. McCuaig*, 54.

LEGAL ESTATE.

Outstanding legal estate.]—*See QUIETING TITLES, 7.*

LIEN.

Mechanics' lien—Mortgagees—Registration—Priority.]—Work was commenced by contractors in December, 1877: two mortgages were registered against the property on the 1st and 8th June, 1878, respectively. The contractors registered their lien on the 18th June, 1878, and on August 28th, 1878, filed their bill.

Held by the Master in ordinary, that the mortgagees were prior, not subsequent incumbrancers.

On appeal, SPRAGGE, C., upheld the Master's ruling. *Hynes v. Smith*, 73.

See ATTORNEY AND SOLICITOR, 2, 5—PARTIES.

LIMITATIONS, STATUTE OF.

1 *Revocation of wills—Possession by agent for infant.]*—Trustees, under a will executed by a woman who afterwards married, received on behalf of an infant devisee the rent of certain lands from the tenant. When the infant came of age the tenant paid the rent to her. Subsequently and after more than ten years had expired, since the trustees first received the rent, the heir-at-law of the testatrix claimed the land, on the grounds that the will was revoked by the subsequent inter-marriage of the testatrix and that the Statute of Limitations did not run for or against an infant.

Held, (without deciding as to the revocation of the will,) that the possession of the trustees was the possession of the infant, and she thus acquired a good statutory title to the land. *Re Goff*, 92.

2. *Title by possession—Infancy.]*
 —In 1879, Beverley Sharp Taylor filed a petition to quiet the title to certain land. It appeared that in 1854 one W. was the owner in fee of the land. In November of that year he died intestate, leaving a widow and children, the youngest of whom was born on the 13th January, 1853. The widow and children lived on the land till the fall of 1855, when they left, and in the spring of 1856 T., the father of the petitioner, entered into possession, erected buildings on the land, and used and dealt with it as his own from 1856 till his death intestate, in 1872. His widow received the rent till the fall of 1878, when she and the co-heirs of the petitioner conveyed the lot to him.

It appeared that some agreement was made between W.'s widow and T., when the latter took possession, but its terms were not definitely established. The youngest and other children of W. claimed the land under this agreement.

THE REFEREE OF TITLES held them barred by the Statute of Limitations.

On appeal, BLAKE, V. C., held, that the petitioner and his father having notice of the claims of the infant heirs of W., the Statute of Limitations did not, during their infancy give a title, so as to enable the petitioner to obtain a certificate.
Re Taylor, 207.

LIQUIDATED AMOUNT.

See Costs, 3.

LUNACY.

An application was made by petition to declare R. a lunatic, and the petitioner failing to produce sufficient

medical testimony, asked for an order dismissing the petition.

PROUDFOOT, V.C., declined to make such order, but made an order declaring that the Court did not see fit to make any order on the application.
Re John Randall, 202.

See PRODUCTION, 4.

LIQUIDATED CLAIM.

See PROHIBITION, 2.

LIQUOR LICENSE.

See TAVERNS AND SHOPS.

MAINTENANCÉ.

See INFANT, 3.

MANDAMUS.

See RULE NISI—RAILWAYS, 1, 2, 3.

MARRIED WOMAN.

See HUSBAND AND WIFE—MORTGAGE, 3—ARREST, 6—PRINCIPAL AND SURETY, 2.

MASTER.

See ADMINISTRATION.

MASTER'S REPORT.

1. *Confirmation of report—Construction of General Orders 252 and 642.]*—A report requiring confirmation does not become absolute until thirty days from the making, and fourteen days from the filing thereof have elapsed. *Re Eaton, Byers v. Woodburn*, 289.

2. *Confirmation of report—When necessary—When execution may issue.]*—Where a decree ordered payment forthwith after the making of a report, an execution, issued before the report had been filed, was set aside, with costs.

Semble, the report did not require confirmation, under the wording of the decree. *Jellett v. Anderson*, 387.

3. *Report—Filing of—Appeal.]*—A report must be filed before a notice of appeal from it is given.

Semble, that seven clear days' notice of appeal is necessary. *Hayes v. Hayes*, 546.

Report—Vacation—G. O. 425—Notice.]—A Master's report made during long vacation in contravention of G. O. 425, is as against a defendant having no notice of the proceedings on which the report is founded, entirely null and void. *Fulcher v. McLean*, 549.

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MECHANICS LIEN.

See LIEN.

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MISDEMEANOR.

See CRIMINAL LAW, 1.

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MISDESCRIPTION IN DEED.

See QUIETING TITLES, 5.

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MISDESCRIPTION IN WILL.

See QUIETING TITLES, 5.

MORTGAGE

1. *Costs—Deposit by defendant on sale—G. O. 428, 429, 436.]*—Where a defendant by bill in a foreclosure suit demanded a sale and paid \$80 into Court as a deposit. *Held*, that although the costs of the sale would exceed that amount, the defendant could not be ordered to increase it, the amount being fixed by schedule S endorsed on the office copy of the bill under order 436. *Cruso v. Close*, 33.

2. *Power of sale—Subsequent encumbrances—Taxation of costs.]*—Where a first mortgagee sells under the power of sale contained in his mortgage, a subsequent mortgagee is entitled to an order to tax the first mortgagee's cost of exercising the power of sale such costs to be taxed as between solicitor and client. *Re Crerar and Muir*, 56.

3. *Married woman—Dower in equity of redemption—O. S. 42, ch. 22—Parties.]*—Where the wife of a mortgagor is a party to and bars her dower by the mortgage, she is not improperly made a party defendant to a bill for foreclosure under the mortgage since the coming into force of the above statute on the 11th March, 1879. *Building and Loan Association v. Carswell*, 73.

4. *Surplus moneys on sale—Claimant of surplus—Payment into Court—Costs.]*—Where mortgagees had a surplus in their hands after a sale under their mortgage, and S. claimed the surplus, but refused to give such proof as the mortgagees required of his title thereto.

Held, that as the mortgagees had acted reasonably in requiring proper proof, and failing to get it, had paid

the surplus into Court, they were entitled to their costs of appearing on S.'s application to have the money paid out to him. *Re Kingsland*, 77.

5. *Discharge of mortgage—Effect of, before registry.]*—The plaintiffs, the Trust and Loan Company, advanced \$2,000 on certain land, on condition that three encumbrances against it should be discharged out of the proceeds of their loan and otherwise. The first and third encumbrancers were paid off, and the former executed a statutory discharge of their mortgage, which was never registered. Subsequently the second encumbrancer, who had not been paid, claimed priority over the plaintiffs. They then obtained an assignment of the first mortgage.

Held, that the discharge of mortgage not having been registered, operated only as a receipt, and the amount paid the first encumbrancer being paid by the Trust and Loan Company, and not by the original mortgagor, that the plaintiff was entitled to priority to the extent of the first mortgage. *Trust and Loan Co. v. Gallagher*, 97.

6. *Deposit for sale—Who entitled to.]*—In a foreclosure suit the official assignee of an insolvent defendant paid \$150 into Court to procure a sale. The proceeds of the sale more than paid the plaintiff's claim in full, but were insufficient to pay the subsequent encumbrancers.

Held, that the deposit should be applied in reduction of the second mortgagee's claim. *Gzowski v. Beaty et al.*, 146.

7. *Proviso in mortgage—Interest.]*—A mortgage was to be void on payment of \$2,000, at 8 per ct., in five years from date thereof, with "in-

terest in meantime half-yearly on, &c., in each and every year of said term of five years; and also upon payment of interest at and after the rate aforesaid upon all such interest money as shall be permitted or suffered to be in arrear and unpaid after any of those days and times, hereinbefore limited and appointed for payment thereof."

Held, that the contract between the parties was simply one for the payment of interest which might be in arrear before, but not after, the expiry of mortgage. *Wilson v. Campbell*, 154.

8. *Abatement—Time—Practice.]*—This suit became abated between the date of the report and the time fixed by it for payment by subsequent encumbrancers.

On an application for a final order of foreclosure, it was refused, and a new day was appointed, allowing the encumbrancers an additional time for payment, equal to the time the suit remained abated. *Biggar v. Way*, 158.

9. *Subsequent encumbrancer—Priority]*—There was two mortgages registered against property, the first mortgagees were pressing the mortgagor for payment, and about to sell out his chattels. and A at the request of the mortgagor, and to stop such sale, advanced \$1,000 to them, and took a mortgage to secure himself from the mortgagor, but with no understanding with the first encumbrancers.

Held, that A., though he thus reduced the first mortgage by \$1,000, and so bettered the position of the second mortgagee by that amount, could not claim priority for his advance over the second mortgagee. *Imperial Loan and Investment Co. v. O'Sullivan*, 162.

10. *Special endorsement to a bill in mortgage suit—Variation of on taking account and settling decree.]*—The special endorsement on a bill claimed a certain amount to be due under the mortgage (which contained the usual covenant to insure). After the service of the bill the plaintiff paid certain premiums of insurance.

BLAKE, V. C., directed notice of settling decree and taking accounts to be served, and the plaintiff's claim to be allowed on proof of the payments being produced. *English and Scottish Investment Co. v. Gray*, 199.

11. *Mortgage suit—Interest payable in advance—Computation of in account under decree.]*—Interest on a mortgage was payable half-yearly in advance on the first of April and October.

The mortgagee filed a bill for sale, and the Registrar on taking the account (in the latter part of January) fixed a day in July following for payment, and allowed the plaintiffs' interest to that date, but refused to allow him the half-year's interest, payable in advance on the first of April.

On appeal, PROUDFOOT, V. C., upheld the Registrar's ruling. *Trust & Loan Co. v. Kirk*, 203.

12. *Mortgagor and mortgagee—Ejectment—Concurrent suit in Chancery—Costs.]*—A mortgagee proceeded in ejectment against a mortgagor, and afterwards filed a bill in Chancery against him for a sale.

Held, that as the mortgagee could since the Administration of Justice Act, R. S. O. ch. 49, obtain in the Chancery suit all the remedies he could obtain in the ejectment suit, the latter should be stayed forever. *Hay v. McArthur*, 321.

13. *Timber on mortgaged property—Sale of by third party—Proceeds, to whom payable.]*—The first of three mortgagees having filed a bill for sale, the other two proved their claims in the suit. No one redeemed by the day appointed, but a final order for sale was not taken out, because one V., who had purchased the equity of redemption, was negotiating with S. the third mortgagee. During these negotiations V. cut and sold a large quantity of the timber on the land to G., whereupon S. filed a bill praying payment by G. of the price of the timber, which had not yet been paid over. *Held*, affirming the Master's ruling, that the first mortgagee was entitled to it. *Scott v. Vosburg*, 336.

14. *Costs—Mortgage—Subsequent encumbrancer—Taxation.]*—First mortgagees sold under power of sale, and paid their attorney's costs. A second mortgagee was held not to be entitled to the right of taxing these costs.

Re Macdonald, Macdonald & Marsh, supra, p. 88, approved. *Re Cronyn, Kew & Betts, Attorneys*, 372.

15. *Quieting Titles Act—Certificate of discharge—Disclaimer of mortgagees.]*—A certificate of discharge of mortgage is of no effect to revest the legal estate until registered. Where a certificate of discharge was lost before registration: *Held*, that the disclaimer of the mortgagees, who were trustees, and the consent of their solicitors was not sufficient to enable the Court to declare the petitioner entitled to the legal estate in fee simple. *Re Moore*, 471.

16. *Quieting titles—Decree of foreclosure—Day reserved for infants to shew cause.]*—Where there was no evidence to shew that infants had

been served with a decree of foreclosure, reserving to them a day to shew cause on attaining their majority, but it was shown that they had been served with notice of proceedings under the Quieting Titles Act, proof of service of the decree was dispensed with. *Re Gilchrist*, 472.

17. *Foreclosure—Infants—Day to shew cause.*]—A final order of foreclosure should reserve a day for infant defendants in shew cause.

SPRAGGE, C., was of opinion that the practice should be changed for the sake of putting an end to litigation, and to the evil of having estates tied up for perhaps many years, but refused to change the practice in the present case. *London and Canadian Loan and Agency Co. v Everitt*, 489.

18. *Mortgage—Interest after maturity.*]—Where no rate of interest is fixed by a mortgage to be paid after maturity, the rate of interest mentioned in the mortgage is chargeable *prima facie*, but the person seeking to reduce it may shew that it is more than the ordinary value of money. *Simonton v. Graham*, 495.

See SHIP—COSTS, 4—SERVICE, 3—FIXTURES — PARTIES—REDEMPTION SUIT—DOWER.

MUNICIPAL ACT.

See ARBITRATION AND AWARD.

MUNICIPAL ELECTION.

1. *Assessment—Municipal election—Quo warranto—R. S. O. ch. 180, sec. 57.]*—E. P. being the lessee of certain premises, he assigned his in-

terest to H. P. after the assessment roll for that year had been returned, with E. P. assessed for the property. No notice of appeal against the assessment was served until several days after the time limited for so doing had expired. The Court of Revision, on appeal, substituted H. P. for E. P. on the roll.

On an application to set aside the election of H. P. as an alderman, on the ground that the defendant was not rated on the roll when it was made out, and that he was not sufficiently qualified: *Held*, that the assessment roll was absolutely binding: and that its correctness could not be tried upon such an application: and that the want of notice was cured by R. S. O. ch. 180, sec. 53. *Regina ex rel Hamilton v. Piper*, 225.

2. *Quo warranto—Municipal election—Reg. Gen. 1, M. T., 14 Vic. j—* A County Court Judge has power to grant a *fiat* in Term time for the issue of a writ of *quo warranto* to try a contested municipal election.

Held, that Rule 1. M. T. 14 Vic., has become inoperative by the effect of subsequent statutory enactments, to which it is repugnant. *Regina ex rel. McDonald v. Anderson*, 241.

3. *Municipal election—Qualification—Quo warranto—43 Vic. ch. 24, sec. 3.]*—*Held*, under 43 Vic. ch. 24 sec. 3, that in estimating the defendant's property qualification, the amount of the mortgages upon the property must be deducted from the assessed, and not from the real value. *Regina ex rel. Kelly v. Ion*, 432.

4. *Municipal election—Quo warranto—Disclaimer—Costs.]*—Defendant was elected to the office of councillor for a town, and accepted the office. Subsequently and before

the issue of the writ of *quo warranto*, the defendant knowing that his election was to be contested, sent the following instrument to the council : "Palmerston, February 7th, 1881. To the Mayor and Council of the Town of Palmerston : Gentlemen, I beg to disclaim my seat at the council board. (Signed) G. S. Davidson."

Held, that the above disclaimer, not being in the form prescribed by R. S. O. ch. 174, sec. 194, was not sufficient to relieve the defendant from costs. *Regina ex rel Mitchell v. Davidson*, 434.

5. *Municipal election—Quo warranto—County Judge—Mandamus.*] —A County Court Judge having directed the issue of writs of *quo warranto* to test the validity of a municipal election, afterwards set aside the writs on certain exceptions taken thereto for irregularity.

Held, that he had power to take this course, and that a Superior Court had no power to interfere with his decision. *Regina ex rel. Grant v. Coleman, Dwyre v. Lewis*, 497.

6. *Municipal election—Contract with corporation.*] —A municipality passed a by-law to exempt from taxation, for a term of years, a mill to be built within its limits by a firm of which defendant was a member.

Held, that there was a contract subsisting between defendant and the municipality, and that he was therefore disqualified from holding the office of reeve. *Regina ex rel. Lee v. Gilmour*, 514.

MUTUAL INSURANCE.

See EXECUTION, 1.

NEXT FRIEND.

See HUSBAND AND WIFE, 1.

NEW ASSIGNMENT.

Pleading.] —A defendant has four days only to plead to a new assignment. *McDonald v. McKinnon*, 13.

NEXT FRIEND.

See HUSBAND AND WIFE.

NOTICE TO REPLY.

See WAIVER.

NOTICE OF TRIAL.

See INTERLOCUTORY JUDGMENT.

ONUS OF PROOF.

See REDEMPTION SUIT.

PARLIAMENT.

1. *Election petition—Commission to examine a witness.*] —*Held*, that in proceedings under a petition filed in accordance with the provisions of the Dominion Controverted Elections' Act, 1874, a commission may be issued to examine a witness who resides in a foreign country. *Re Cornwall Election Petition*, 64.

2. *Controverted election—Preliminary objections—Answer—Embarrassing matter—Jurisdiction.*] —In a Dominion Controverted Election case, a sitting member can file a cross petition only against a candidate who is not a petitioner.

Where a respondent had filed certain preliminary objections to the petition, which were overruled, he was not allowed to insert similar objections in his answer, and the clause containing them was struck out.

The respondent cannot, in his answer, set up that the petitioner was by himself and his agents, guilty of corrupt practices, whereby he became disqualified to be a candidate.

The Court or a Judge has power on a summary application to strike out any allegations in an answer which are not an answer in law, and might be embarrassing at the trial of the petitioner. *Re North Oxford Election*, 526.

PARTICULARS.

See DEFAMATION, 1—SPECIAL ENDORSEMENT.

PARTIES.

Mechanics' Lien Acts—Parties to suit—Costs—Practice.]—A mortgagee filed a bill of sale, making certain lien-holders under the Act parties defendants therein, alleging that the work, by virtue of which their liens arose, was commenced after the registration of his mortgage. Held, that the lien-holders should have been made parties in the Master's office; and plaintiff's costs of making them defendants by bill, were disallowed on revision of taxation. *Jackson v. Hammond et al.*, 157.

See FIXTURES.

PARTITION.

1. Partition under G. O. 60—Reference—Jurisdiction of Referee]—Under G. O. 640, where special

circumstances are shewn on an application for partition or sale of lands, a reference to a Master other than the Master in the county town of the county where the lands are situate will be directed.

The application under the order should be made to a Judge in Chambers. *Re Arnott, Chatterton v. Chatterton*, 39.

2. Partition—Lands in different counties—G. O. 641—Costs—G. O. 643.]—After an order for partition of lands in the county of Peel had been granted by a Master under G. O. 641, an order was made by a Judge in Chambers to include in said order lands in another county, though such lands were known of at the time the partition order was made.

The costs of the application were allowed, exclusive of the usual commission under G. O. 643. *Clark v. Clark et al.*, 156.

3. Commission and disbursements under G. O. 640, 643—Discretion of master—Appeal—Revision of disbursements.—Where a master in his discretion fixes the commission to be allowed to parties under G. O. 643, and settles the disbursements in the suit, there is an appeal to a Judge in Chambers from his finding.

The disbursements should still be submitted to the Master in Ordinary for revision like other bills of cost. *Campbell v. Campbell*, 159.

4. Receiver—Stranger in possession—Practice.]—A notice of motion for partition having been served, the plaintiff moved for an injunction restraining the defendant from collecting rents, and for a receiver. It appeared that the defendant was a stranger, whose right to be in possession was denied.

Held, that no relief could be had against him without bill filed. *Young v. Wright*, 198.

5. *Jurisdiction of Master under G. O. 640—Question of title raised.*]

—The jurisdiction created by G. O. 640, is intended to be exercised in simple cases only where there is no dispute. Where questions are raised of title, or the like, a bill must be filed. *Macdonell v. McGillis*, 339.

6. *Partition—Master's office—Advertisement for creditors—Practice.*]

—The fact that an intestate whose estate is being partitioned, has been dead for 45 years, does not warrant the Master in dispensing with the usual advertisement for creditors. *Biggar v. Biggar*, 488.

7. *Parties—Adverse possession—G. O. 640—Practice.*]

—The defendant who occupied the property in question, in a partition suit, claimed an absolute title by possession under the Statute of Limitations. The Master, notwithstanding, continued the enquiry, and proceeded to take evidence.

SPRAGGE, C., directed the plaintiff to file a bill within two weeks, and the parties to go to a hearing at the then ensuing sittings at Cornwall, costs to be costs in the cause. *Re McMillan, Patterson v. McMillan*, 546.

PAWNBROKER.

Interest—Pawnbroker—Certiorari.]
—A pawnbroker, under Consol. Stat. C. ch. 61, may legally charge any rate of interest that be agreed upon between him and the pledger.

Where a defendant has been committed for trial, but afterwards admitted to bail and discharged from

custody, a Superior Court of law has still power to remove the proceedings on *certiorari*, but in its discretion it will not do so where there is no reason to apprehend that he will not be fairly tried.

Remarks upon the law relating to pawnbrokers. *Regina v. Adams*, 462.

PAYMENT OUT OF COURT.

1. *Money in Court—Jurisdiction of Referee.*—Where money is paid into Court under an order giving leave to “*apply at Chambers*” for its payment.

The Referee has jurisdiction to make the order for payment out. *In re Selby*, 342.

2. *Appeal—Money in Court—Interest on—Security for.*—About \$40,000 was paid into Court during the progress of the suit. The decree dismissed the bill, and ordered payment of the money in Court to defendant.

The plaintiff appealed, and paid \$400 into Court as security for costs. Subsequently an order was made by the Referee staying payment out to defendant, pending the appeal, upon the plaintiff giving additional security to the amount of \$200 for the difference between the legal interest and that allowed by the Court.

Held, on appeal that such order was not *ultra vires* nor unreasonable. *McDonald v. Worthington*, 554.

PLEADING.

1. *County Court—Abatement.*—The defendant pleaded to an action in a Superior Court, on a writ specially endorsed for \$410, that there was a suit pending in a County Court

brought by the plaintiff's against the defendants, for the same cause of action. *Held*, that the plea should aver that the cause of action in the first suit was within the jurisdiction of the County Court. *Morgan v. Ault*, 429.

2. *Declaration — Time, computation of*—*R. S. O. ch. 50, sec. 93.* A plaintiff must declare within one year after the service of the writ of summons, inclusive of the day of service. *Murchison v. Canada Farmers' Ins. Co.*, 451.

Joiner of counts.]—See REPLEVIN, 1.—See NEW ASSIGNMENT, 1—WAIVER—TROVER—DEFAMATION—PRINCIPAL & SURETY, 1—JURY, 2—VENUE, 1.

POSSESSION.

See LIMITATIONS, STATUTE OF—[Adverse possession.] — See PARTITION, 7.

POUNDAGE.

See SHERIFF.

PRINCIPAL & SURETY.

1. *Pleading — Consideration — Equitable plea.]—Declaration upon a promissory note. Third plea—“That the defendant made the said note with and for the accommodation of one W. C., at the request of the plaintiffs, in respect of a pre-existing debt, then due to the plaintiffs, by the said W. C. alone, and the said note was drawn payable on demand, with interest at ten per cent., and except as aforesaid there was never any value or consideration for*

the making or payment of the said note by the defendant.” Fourth Plea—On equitable grounds. That the defendant made the note jointly and severally with W. C. for his accommodation, and as his surety only, to secure a debt due to the plaintiffs, and that after the note became due the plaintiffs gave W. C. an extension of time for the payment of the note.

Held, that the third plea was good, for it shewed that no extension of time had been given, and therefore that there was no consideration ; and that the fourth was not an equitable plea, and must be amended by striking out the words, “upon equitable grounds,” and the jury notice served with it allowed to stand. *Merchants' Bank v. Robinson*, 117.

2. *Married woman — Surety.]—*

Held, in an interpleader suit, that a married woman was not a proper surety, and time was given to substitute another surety for her. *Mullin v. Pasco*, 372.

See ARREST, 4.

PROCESS

See SERVICE, 4.

PRODUCTION.

1. *Master's office.]—In an administration suit a creditor filed a claim in the Master's office for \$11,000, and produced promissory notes for all but a small part in proof of his claim, and offered to allow an inspection of his books at his place of business. The Master as of course ordered a production of the books and vouchers of the creditor in order*

to shew how the amount of the notes was arrived at.

Held, on appeal that, in the first instance (no special case being made) the Master should not have required the creditor to do more than he offered, *i. e.*, an inspection of the books at the office of the creditor, but if upon that any doubt was cast upon the accuracy of the account and the notes, then production might be ordered. *Re Ross*, 86.

2. *Examination of parties—Production of books—Attachment—Dismissal of action.*]—Where a party to be examined refuses to produce books, &c., as required by the notice to produce, served with the order to examine under R. S. O. ch. 50, sec. 161, or refuses or neglects to attend for examination, or refuses to be sworn or to answer lawful questions, pursuant to such order, proceedings against him by attachment must be taken before the *Court*, and not before a Judge in Chambers.

Semble, that the action cannot be dismissed under R. S. O. ch. 50, sec. 170 *a*, 41 Vic. ch. 3, sec. 9, for disobedience by the plaintiff of the notice to produce.

Held, also, that the refusal to produce the plaintiffs' books, under the facts stated below, was not warranted. *Merchants' Bank v. Pierson*, 123.

3. *Order to produce under G. O. 134—Not enforceable on a reference—Practice.*]—Orders to produce under G. O. 134, are made for the purposes of the hearing only, and such orders will not be enforced for the purposes of the hearing only, and such orders will not be enforced for the purposes of a reference:—the proper course is an application to the Mas-

ter, to whom matters in dispute have been referred." *Hilderbroone v. McDonald*, 389.

4. *Production—Lunatic plaintiff.*]—Where a person of unsound mind sues by a next friend, the usual præcipe order that the plaintiff do produce is proper, and is sufficiently obeyed by the affidavit of the next friend. *Travis v. Bell*, 550.

Production of note.]—See DIVISION COURT, 8.

PROHIBITION.

1. *Division Court—Jurisdiction.*]—On an application for a prohibition to a Division Court after judgment and execution, where the question of jurisdiction depends upon disputed facts—as in this case, upon whether the person by whom the bargain sued upon was made, acted as plaintiff's or defendant's agent, if the Division Court Judge has decided this question on evidence, and found in favour of his jurisdiction, the Court will not interfere with his finding; but here, there having been no such decision, and the want of jurisdiction being clear upon the affidavits filed, a prohibition was granted. *Stephens v. Laplante*, 52.

2. *County Court—Jurisdiction—Liquidated and unliquidated claim.*]—A County Court has jurisdiction to try a claim up to \$400, which is made up of an unliquidated amount of less than \$200, and the balance of a liquidated amount. *Vogt v. Boyle*, 249.

See DIVISION COURT—CRIMINAL LAW, 4—ATTACHMENT.

PROSECUTION (WANT OF.)

See DISMISSAL OF BILL.

QUIETING TITLES.

1. *Quieting Titles Act—Division Court bond—Release of by* 36 Vic. c. 6, sec. 5, O.—All Division Court bonds made before 1st July, 1869, are effectually released by 36 Vic. ch. 6, sec. 5, O., as to liabilities incurred thereunder, both before and since that date. *Re Franklin*, 470.

2. *Quieting Titles Act—Tenant for life—Consent to petition.]—Where a petitioner under the Quieting Titles Act has only an estate in fee in remainder, the consent of the tenant for life must be obtained before the petition can be filed.* *Re Pelten*, 470.

3. *Quieting Titles Act—Contestant—Certificate—Evidence]—A contestant under the Quieting Titles Act must file a petition in his own name before a certificate can issue in his favour, but he may use on such petition the evidence adduced on the petition in which he was contestant.* *Re Dunham*, 472.

4. *Quieting Titles Act—Effect of conveyance by petitioner after petition filed—Registrars' abstracts.]—Parties to whom land has been conveyed after the registration of the certificate of the filing of the petition, and pending the investigation of the title, must be substituted as petitioners.*

Registrars' abstracts must be continued to the dates of the certificate of title. *Re Cummings*, 473.

5. *Quieting Titles Act—Misdescription in will—Misdescription in deed—Effect of.]—Where a petitioner*

under the Quieting Titles Act claimed title as devisee of certain land, but the description of the land in the will was different to that of the land, which he claimed: *Held*, that he might establish a title shewing a misdescription in the will.

But where a misdescription occurred in a deed: *Held*, that the petitioner had merely established an equity to have the deed reformed, and that under the Act the Court could not declare the title as though the deed had in fact been reformed. *Re Callaghan*, 474.

6. *Quieting Titles Act—Vesting order—Entireties—Effect of joining of wife to bar dower—Registration of plan.]—When a petitioner under the Quieting Titles Act claimed title through a vesting order made upon a sale under a decree in an administration suit: *Held*, under *Green v. Doble*, 15 Gr. 665, that in the absence of proof to the contrary, the order should be assumed to be regular, and that it was unnecessary to give evidence shewing title.*

Where a deed in a chain of titles had been made to a husband and wife as joint tenants: *Held*, following *Shaver v. Hart*, 31 U. C. R. 603, that notwithstanding terms of the deed the husband and wife took by entireties. And where the husband made a conveyance of the same land in the lifetime of his wife, she merely joining to bar her dower, and she predeceased her husband: *Held*, that the husband's deed conveyed the fee.

Where pending the investigation of the title, the petitioner laid out the land in village lots and registered a plan: *Held*, that the petition must be amended in accordance with the plan. *Re Morse*, 475.

7. *Quieting Titles Act—Outstanding legal estate—Certificate.*]—Where the title of a petitioner under the Quieting Titles Act was established except as to an undivided one-fifth interest in the bare legal estate, which appeared to be outstanding in an infant: *Held*, such interest must be got in by the petitioner, or be declared in the certificate of title to be outstanding. *Re Raynerd*, 476.

8. *Quieting Titles Act—Registrar's abstract—Substitute for.*]—Where in a petition under the Quieting Titles Act, it was shewn that the registrations on the whole lot, of which the land in question formed a part, numbered over 560, and that it would take six months and costs \$100 to prepare an abstract:

Held, that the abstract might be dispensed with, if the affidavit of a Provincial Land Surveyor were filed, proving that he had examined all the registrations on the lot, and that only certain specified numbers affected the land in question. *Re Morse II.* 477.

See MORTGAGE, 16.

QUO WARRANTO

See MUNICIPAL ELECTIONS.

RAILWAYS.

1. *Railway Co.—Bondholders—Registration—Mandamus.*]—A trustee held certain debentures of a railway company on trust to secure certain creditors of the company for advances made by them, which debentures were to be handed over to the creditors for sale, upon the company making default in payment of the advances. The company made

default, and the debentures were delivered over to the creditors:

Held, that the creditors were entitled under 34 Vic. ch. 43, sec. 33, to be registered as holders of the debentures, to enable them to qualify and vote for directors; and that a *mandamus* should issue to compel the company so to register them. *In re Thompson et al. and The Victoria R. W. Co.*, 423.

2. *Railway bonds—Transfer—Registration—Mandamus—38 Vic. ch. 56.*]—O., being the holder of fourteen bonds of the railway company, issued on 1st May, 1876, payable on 1st January, 1881, with interest meanwhile half yearly at 6 per cent. per annum, requested the secretary of the company to register the bonds under 38 Vic. ch. 56, O. This the secretary refused to do unless the intermediate transfers were produced and registered at the same time.

Held, that the secretary was bound to register the bonds without the production or registration of the transfers, and a summons for a *mandamus* was made absolute with costs. *In re Osler v. The Toronto, Grey, and Bruce R. W. Co.*, 506.

3. *Mandamus—Railway bonds, registration of.*]—The Canadian Bank of Commerce received from M. R. & Co., bankers in London, bonds of the T. G. & B. Ry., to the amount of £105,800, represented by M. R. & Co. as belonging to different persons named, and tendered them for registration at the railway office, in order that these persons might vote thereon. The secretary of the railway company registered such of the bonds as stood in the names of the original holders, but refused to register the others unless written transfers from the original holders were produced:

Held, that the company should register the bonds without the production of the transfers; that the proof of title in the alleged owners was sufficient; that the issue of scrip in London as representing the bonds formed no objection; and a mandamus to register the bonds was granted. *In re Johnson and The Toronto, Grey, and Bruce R. W. Co.*, 535.

4. *Railway bonds—Voting—Victoria railway.*]—By the Act of incorporation of a railway company, every shareholder was entitled to vote for every share held by him. It was provided by the same Act, that if the interest on the bonds issued by the company should be in arrear, all holders of bonds should have the same right of voting and qualification for directors as were attached to shareholders.

Held, that the bondholders were not entitled to more than one vote on each bond. *Bunting et al. v. Laidlaw et al.*, 538.

RECEIVER.

Appointment of.]—On the 29th January, 1878, an order was made directing that D. be Receiver in the suit, he first giving security to the satisfaction of the Registrar.

At the date of the order and previously thereto, D. was the agent of the mortgagor, and as such collected the rents of the property in question.

D. received verbal notice of the order and executed his own bond as security, which the Registrar declined to accept, and D. continued to receive the rents and pay them to the mortgagor. On the 20th May, D. executed a second bond, reciting order of the 29th January, and conditioned that he “do and shall ac-

count for every sum of money which he shall receive on account of rent,” which was filed on the 22nd of May, and on the 3rd of June, a copy of the order of the 29th January, was served on him, and he was notified that his security had been accepted.

Held, by the Master in Ordinary, affirmed on appeal by SPRAGGE, C., that D. was accountable for the rents received since the 29th January, but was entitled to be allowed for any disbursements properly made by him. *Western Canada, &c. v. Ince*, 262.

See PARTITION, 4.

REDEMPTION SUIT.

Subsequent encumbrancer—Claim of—Onus of proof—M. O.—A decree for redemption was made, which directed an account to be taken of the amount due by the plaintiff, representing the mortgagor, to the defendants.

The defendants, on proving their claim in the M. O., produced their mortgages, and filed an affidavit verifying their claim, and stating that \$20,309.88 was due them for moneys advanced by them to the mortgagor and secured by the said mortgages.

Held, by the Master in Ordinary and affirmed by BLAKE, V. C., that their claim was *prima facie* proven, and the onus of reducing the amount of it rested on the plaintiff. *Court v. Holland—Ex parte Doran*, 213.

REFEREE.

Jurisdiction of Referee—Appointing representative ad litem—R. S. O. ch. 49, sec. 9.—A motion made under R. S. O. ch. 49, sec. 9, to appoint an administrator *ad litem* of the estate

of a deceased person, may be made before the Referee, as that section merely extends a jurisdiction already possessed by him under G. O. 56. *Collver v. Swayzie*, 42.

2. *Payment by executor into Court—Admission—Practice—Jurisdiction of Referee.*]—The Referee in Chambers has no jurisdiction to make an order for payment into Court by an executor or administrator of amounts admitted by him to be in his hands. *Re Curry, Wright v. Curry*, 340.

See PAYMENT OUT OF COURT.

REGISTRATION.

Of railway bonds.]—See RAILWAY.

RELEASE.

See STAY OF PROCEEDINGS.

REMUNERATION.

See TRUSTEES AND EXECUTORS, 1, 3.

RENDER.

See SUPERSEDEAS.

REPLEVIN.

1. *Pleading—Form of Counts—Replevin Act.]—In an action of replevin the sheriff replevied part of the goods, and certified in his return to the writ that the remainder had been eloigned to places unknown before the writ came into his hands. The plaintiff declared in two counts. 1. For that the defendant unjustly detained the goods of the plaintiff,*

specifying the goods, replevied, until, &c. 2. For that the defendant unjustly detained and still detains, against sureties and pledges, the goods of the plaintiff, specifying the goods eloigned.

Held, under R. S. O. ch. 53, sec. 24, that the second count was maintainable; that the two counts were properly joined, and that the declaration was not open to objection. *Thurston v. Breard*, 10.

2. *Replevin—Description—Seizure of goods conveyed to a third party—Amendment.]—The plaintiff issued a writ of replevin directing the sheriff to replevy “two hundred and thirty sheep and lambs,” unjustly detained by the defendant. On the previous day the defendant had sold the property to one Gill, in whose possession it was when the seizure was made.*

Held, that the above description was not sufficient, and that the articles could not be seized under the writ while they were in the possession of a party not named therein. Plaintiff was allowed to amend the description and substitute or add Gill as a defendant. *Hoorigan v. Driscoll*, 184.

REPORT.

See MASTER'S REPORT.

REVIVOR.

See SCIRE FACIAS AND REVIVOR, 11.

RULE NISI.

Rule Nisi—Enlargement—Lapse—Mandamus.]—Where a rule nisi in a County Court was ordered by

the Judge to stand over until the next term,

Held, that it was not necessary to take out a rule to enlarge the rule *nisi*, to prevent it from lapsing.

Where a County Court Judge improperly refuses to hear the argument of a rule *nisi*, *mandamus* is the proper remedy; and where the refusal to hear had been caused by an unmeritorious objection deliberately taken and insisted upon by defendant, he was ordered to pay the costs of the application for *mandamus*. *In re Dean v. Chamberlain*, 303.

SALE OF LAND BY ORDER OF THE COURT.

1. *Sale under decree—Purchase money—Payment into Court.*]—On a sale under a decree, the purchaser, except under special circumstances, will not be compelled to pay his purchase money into Court until he has accepted or approved of the title, or the Master has reported that the vendor can make a good title. *McDermid v. McDermid et al.*, 28.

2. *Fraudulent conveyance—Sale under decree—Execution.*]—Where a decree directed a sale of certain property at the expiration of a year from the date of a Master's report, a sale at the end of a year from the date of the decree, instead of the date of the report, was allowed under special circumstances, on the ground that the decree was in effect equivalent to a judgment at law. *Porte v. Irwin et ux.*, 40.

3. *Sale under decree—Application of purchase money—Vesting order.*]—The bill was filed by a second mortgagee, the first mortgagee not

being made a party. At a sale under the decree, M. purchased the land, and afterwards paid the purchase money into court; he then mortgaged the land, then conveyed his equity of redemption, and then took out a vesting order. Grant, a subsequent mortgagee, claimed payment of his claim out of the moneys in court. On the 19th November, on the application of M., the referee made an order, directing payment to the assignee of the first mortgagee of his claim out of the purchase money in court.

It appeared that M. thought he was purchasing free from incumbrances, and was ignorant of the first mortgage.

On appeal, PROUDFOOT, V. C., upheld the Referee's order. *Fleming v. McDougall*, 200.

4. *Sale in mortgage suit—Application of purchase money—Delay in proof of claim by encumbrancer—Costs.*]—The widow of a mortgagor, the defendant in a mortgage suit, did not prove her claim for dower on the reference before the Master, as it was not then certain that the rights of the mortgagee would be fully protected, and she was not found an incumbrancer by the report.

By consent of all parties a sale was had, and the purchaser paid ten per cent. of the purchase money down, but subsequently applied for and obtained from the Referee an order dispensing with the payment of the purchase money into Court, and vesting the estate in the purchaser.

The widow opposed the granting of this order, claiming to be allowed in to prove her claim for dower, but without avail.

On appeal, PROUDFOOT, V.C., allowed the appeal, and reversed the Referee's order, but without costs, as

the dilatory conduct of the widow had invited discussion. *Hyde v. Barton*, 205.

5. Purchaser under a decree—Compensation to—Relief from contract.]—At a sale under a decree on the 25th March, 1879, A. purchased the land in question. On the 19th April, 1879, he transferred his interest to W., and on the 26th April, one H. purchased and took an assignment of the dower of one S. in the land.

On the 16th February, 1880, A. applied to be relieved from the contract to purchase on the ground of the outstanding dower.

The evidence shewed that S. had agreed with the heir-at-law to accept a gross sum in lieu of her dower, that W. really purchased the dower, but took the assignment in H.'s name, and that this application though in A.'s name, was really made by W.

Held, that no relief could be granted, the applicant having himself created the obstacle by means of which he sought to prevent the sale being carried out. *Fraser v. Gunn*, 278.

6. Sale under decree—Tender by plaintiff refused—Practice.]—On the reference under the decree in a mortgage suit, the plaintiff put in several affidavits as to the value of the property, \$3,500 being the highest price named in them. The defendant did not file any affidavits in reply. The plaintiffs then tendered \$3,500 for the property, which the Master declined to accept without an order directing him to do so.

The Referee on application refused such order, and on appeal, SPRAGGE, C., upheld his judgment. *Ramsay v. McDonald*, 283.

7. Land to be sold under a decree—Tender for—Compensation.]—Where land was advertised for sale under a decree, and the purchaser, the owner of the adjoining lot, who had also been in possession, by his son, of the advertised premises, tendered for them, knowing that the lands comprised fewer acres than the advertisement stated, and intending to seek an abatement after the purchase was completed, and a subsequent incumbrancer offered to give the same price for them as the purchaser.

Held, by Mr. Stephens, Referee, that the petitioner should be put to his election either to take the land without abatement of the purchase money, or to let it go to the subsequent incumbrancer. Affirmed on appeal. *Carmichael v. Ferris*, 289.

8. Interest upon purchase money—Taxes—Certified copies of documents.]—(1) Where, in a sale under a decree, no undue delay in investigating the title is attributed to either party, interest upon purchase money is payable only from the date of the acceptance of the title, and not from the time named in the conditions of sale; (2) where title was accepted, and possession given on the 6th of March, 1880.

Held, that under sec. 347, of the R. S. O. ch. 174, and the terms of the city by-law, no taxes were due so as to form a charge on the land until 4th June, the date when the first instalment of taxes was due, and that the vendors therefore were not bound to pay any part of the taxes for that year.

Held, also, that the purchaser had no right to certified copies of registered and other documents procured at the expense of the vendors. *Harrison v. Joseph*, 293.

9. Sale—Leave to bid.]—A Master has no power to give leave to bid to a party conducting a sale. Application must be made to the Court. *Re Laycock—McGillivray v. Johnson*, 548.

See FRAUDULENT CONVEYANCE—MORTGAGE, 6—FIRE.

SCIRE FACIAS AND REVIVOR.

1. Dower—Death of tenant of freehold.—A plaintiff in an action for dower recovered judgment, but before the execution of the writ of assignment of dower, and after its issue, the tenant of the freehold died, having devised the land in question to the present defendant.

Held, that the plaintiff must proceed against the devisee by *scire facias*, and not by suggestion or revivor. *Davis v. Dennison*, 7.

2. Assignee of judgment—Suggestion—35 Vic. ch 12.]—*Held*, that since the passing of 35 Vic. ch. 12, sec. 1, O. R. S. O. ch. 116, the assignee of a judgment is entitled to revive the same in his own name by entering a suggestion on the roll. *Phillips v. Fox*, 51.

3. Revivor order—Discharge of Practice.]—An order of revivor was obtained in the cause on the ground that the sole plaintiff had assigned all his interest, &c., to one Close.

The plaintiff applied to the Court by petition to set aside the order, disputing the assignment on the allegation of which the order was obtained.

PROUDFOOT, V. C., discharged the order of revivor with costs. *Fisker v. Ince et al.*, 147.

SECURITY.

For interest on money in Court.]—*See PAYMENT OUT OF COURT.*

SECURITY FOR COSTS.

See Costs.

SEQUESTRATION.

Motion for—Length of notice.]—On moving for a writ of sequestration for a breach of an injunction, two clear days' notice of motion is sufficient. *Cook v. Credit Valley Railway Co.*, 167.

SERVICE.

1. Ejectment—Signing judgment.]—The writ of summons in ejectment was served upon the defendant's wife after he had left the country. An order to sign judgment against the husband was granted in default of appearance. *Trust and Loan Co. v. Jones*, 65.

2. Examination of defendant—Time—Notice—Service Reg. Gen. 135.]—*Held*, that service on the defendant's attorney at his home at 9.30 p.m. on Saturday of an order and appointment to examine the defendant at 2 p. m. on the following Tuesday, was irregular, the notice not being sufficient.

Held, that Rule of Court 135, applies to the service of orders and appointments to examine, and that this service must be treated as if made on the following Monday. *Senn v. Hewitt*, 70.

3. *Absconding defendant who was assignee in insolvency—Substitutional service—Inspector.*]—Where a bill had been filed for foreclosure, and the defendant, the official assignee of the mortgagor, absconded before the bill was served an order was granted allowing substitutional service on one of the two inspectors of the insolvent's estate. *London Loan and Agency Co., v. Thompson*, 91.

4. *Foreign corporation—Agent.*]—The defendants were a foreign insurance company doing business in Ontario, and having a head office for this Province at Toronto. The writ of summons was served on the local agent of the defendants' company at Ottawa.

Held, that the service was good. *Wilson v. Aetna Life Insurance Co.*, 131.

5. *Ca. sa.—Judgment debtor—Costs.*]—When serving a defendant with an order to examine him as a judgment debtor, it is not necessary to exhibit the original order, unless demanded, in order to entitle the plaintiff to move for a *ca. sa.* against him, under R. S. O. ch. 50, sec. 305.

Where a judgment debtor disobeyed an order for his examination, he was directed to pay the costs of an application for *ca. sa.*, although the motion was dismissed upon his giving a sufficient excuse for his disobedience. *Imperial Bank v. Dickey*, 246.

6. *Notice of examination and hearing—Time—Practice.*]—Notice of examination and hearing was served at a few minutes past four, on the last day for giving notice on solicitors of one defendant, who admitted service, but on the same day, discovering that the notice had been

served too late, they wrote to the plaintiff's solicitors repudiating their admission, and saying that they would move to set aside the notice.

On a motion it was shewn that there was no other service or notice than as above mentioned, and the application was thereupon refused: *Scott v. Burnham*, 3 C. C. 402, followed.

Semble, that the acceptance of service would not be binding, having been so soon repudiated. *Wright v. Way*, 328.

7. *Alien defendant out of jurisdiction—Service—Irregularity—Amendment.*]—A copy of a writ of summons, instead of a notice thereof, had been served upon a defendant, not a British subject, outside of Ontario :

Held, that this was an irregularity which could not be amended, and that the copy and service of the writ should be set aside. *Henderson v. Hall*, 353.

8. *Service by publication—Contents of notice—Præcipe decree.*]—Where a defendant is served by publication under G. O. 100, in order that a *præcipe* decree may be obtained, the notice should contain the special endorsement in Schedule G. to Order 436, otherwise the cause must be set down to be heard *pro confesso*. *Pherrill v. Forbes*, 408.

9. *Service of bill of complaint—Assignee in insolvency—Absconding defendant.*]—Where the defendant in a suit had absconded to the United States before the filing of the bill, and two months after the filing of the bill an assignee in insolvency was appointed by the creditors of the defendant, and the assignee was served with the bill, but not within the

time limited by the General Orders. The Referee in Chambers made an order allowing the service as good, though made fourteen months after the bill was filed.

Held, on appeal, affirming the Referee's order, that the defendant having absconded was a sufficient reason for not proceeding with greater diligence. *Goderich v. Brodie*, 486.

SET OFF.

See Costs, 9.

SHERIFF.

Sheriff—Poundage—Allowance in lieu of [—The poundage of a sheriff cannot be taken to cover more than the risk and responsibility cast upon him when he seizes, retains, and sells goods and from this levy returns the money. If the sheriff's action be intercepted, so that he does not make this money it is for the Court to say what allowance shall be made him in lieu of poundage. *Wadsworth v. Bell*, 478.

See Costs, 5, 7—*VENUE*, 2.

SHIP.

Mortgage—Expenses of voyage—Priority—Where certain persons, including G., advanced money to complete building a yacht at Cobourg, in order to sail for prizes at New York and Philadelphia, and scrip under seal was executed declaring that G. was to hold the yacht in security for the advances; and G. expended certain running expenses in taking the yacht to the race:

Held, that G. was entitled to a

first charge on the proceeds of the sale of the yacht, for these expenses being incurred in prosecuting the enterprise for which the trust was created. *Burn v. Gifford et al.*, 44.

SIMILITER.

See JURY NOTICE—JURY, 2.

SPECIAL BAIL.

See ABSCONDING DEBTOR, 1.

SPECIAL ENDORSEMENT.

Special endorsement—Common counts—Particulars—Reg. Gen.]—The particulars of claim upon a writ of summons specially endorsed to which the defendant appears, do not bind the plaintiff as particulars under a declaration on the common counts, and, in such a case, he must comply with a demand for particulars made by the defendant. *Huggins v. Guelph Barrel Co.* 170.

SPECIFIC PERFORMANCE.

See ARREST, 5.

STAY OF PROCEEDINGS.

1. *Dismissal of action—Notice of trial—Examination* [—A summons to dismiss an action for breach of an order to examine, generally implies a stay of proceedings; but where the Judge who granted the summons struck out the part relating to a stay, and the summons was afterwards enlarged without any mention of a stay, a notice of trial served while the

summons was pending, was held to be regular. *Merchants' Bank v. Pierson*, 129.

2. Release of action—Stay of proceedings]—After issue joined one of two plaintiffs gave to the defendant a release under seal of all actions and demands. The defendant thereupon moved to stay all proceedings in the suit.

Held, that the defendant should plead the release, and that he was not entitled to a stay of proceedings, and the remaining plaintiff was allowed to strike out the name of the other plaintiff. *McAlpine and Keen v. Carling*, 171.

SUMMONS, WRIT OF.

See SERVICE, 7.

SUPERSEDEAS.

Render—Relation.)—Judgment was signed against defendant in Michaelmas Term, and he was rendered in discharge of his bail in the vacation following :

Held, on an application for a *supersedeas*, that the render related back so as to include Michaelmas as one of the two terms within which the plaintiff must charge the defendant in execution ; and that not having been charged in execution until Easter Term he was entitled to his discharge.

Where a person is once supersedable for want of being charged in execution, he always continues so, even though he is afterwards charged in execution, before the application for a *supersedeas*.

An application for a *supersedeas* was entertained, although a similar

application in the same case had already been dismissed. *Wheatley v. Sharpe*, 307.

SUPPLEMENTAL ANSWER.

Supplemental answer—Time—Matter introduced.]—The bill alleged that defendant had given the plaintiff certain notes on account of the purchase money of a vessel, and a mortgage on the vessel as collateral security. Defendant's answer filed in November, admitted this allegation, which was denied by his co-defendant. In March he applied for leave to file a supplemental answer, withdrawing his admission, and setting up that the notes were given for plaintiff's accommodation, and denying the allegation as to the mortgage. His affidavit stated that he had forgotten the facts, which occurred some years since, when he swore to his answer, and he only remembered them on having a conversation with his co-defendant. The application was refused. *Wright v. Way*, 326.

SURRENDER.*

By bail.]—*See ARREST*, 10.

TAVERNS AND SHOPS.

Liquor license—Married woman.)—A married woman was lessee of certain premises in which her husband sold liquor without a license, contrary to the provisions of R. S. O. ch. 181 : *Held*, that she was liable to be fined under sec. 83 of the Act, although the sale of liquor took place in her absence. *Regina v. Campbell*, 55.

TAXATION.

See COSTS, 4, 5, 6, 7, 10, 16—ATTORNEY AND SOLICITOR—MORTGAGE, 14.

TAXES.

See SALE OF LAND BY ORDER OF THE COURT, 8.

TENANT FOR LIFE.

See QUIETING TITLES, 2

TENANCY BY CURTESY.

Administration suit—Tenant by curtesy.—A testator devised his property to trustees, in trust to pay the rents and profits to his wife *durante viduitate*, and if she married again she was to have an annuity, and the property was to be applied as directed for the benefit of the children, and divide among them when the youngest came of age. One daughter married, and died before the period of division, leaving a husband and two children. The testator's widow married again before the death of the daughter. *Held*, that the husband of the daughter was tenant by courtesy of her share. *Jones v. Dawson*, 481.

TENDER.

See SALE OF LAND UNDER ORDER OF THE COURT, 5.

TERM MOTION.

See COSTS, 9.

TERM'S NOTICE TO PROCEED.

1. *Old issue—Notice of trial.*]—Where no proceedings has been taken in the cause for a year subsequent to issue being joined, the plaintiff must give a term's notice of his intention to serve notice of trial. *McCleary v. Morrow*, 12.

2. *Enlargement—Term's notice.*]—Where a summons was enlarged *sine die* by the consent of counsel and nothing further was done in the suit for more than a year.

Held, that a term's notice of the plaintiff's intention to proceed was necessary, before he could make any motion in the cause. *Bank of Montreal v. Foulds et al.* 182.

3. *Side-bar rule—Discontinuance.*]—Issuing a side-bar rule to discontinue the action is not a proceeding within the meaning of the rule which require a term's notice of plaintiffs' intention to proceed, where no proceedings has been taken in the cause for a year. *Bank of Montreal v. Foulds et al*, 236.

TIMBER, PROCEEDS OF.

See MORTGAGE, 13.

TIME.

See APPEAL, 5—PLEADING, 2—SERVICE, 9.

TITLE.

See VENDOR AND PURCHASER.

TROVER.

Pleading — Uncertainty.]— The plaintiff alleged in one count in trover that the defendant converted to his own use, or wrongfully deprived the plaintiff, &c. *Held*, overruling Bain v. McKay, 5 P. R. 471, that the count is not embarrassing. *Taylor v. Adams*, 66.

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TRUSTEES AND EXECUTORS.

1. Remuneration of trustees.]— Trustees on assuming the trust estate are not to be allowed a commission for merely taking the same over ; but trustees, properly dealing with the estate, and handing it over on the determination of the trust, are entitled to one commission, for the receipt and proper application of the estate, payable out of the *corpus*. Trustees are not entitled to a commission for the investment or re-investment of the funds of the estate. They are entitled to a commission on the receipt and payment of the income of the estate, payable out of the income, and to a compensation for looking after the estate, payable out of the *corpus*. Trustees may not unreasonably be allowed something for services not covered by the commission awarded. *Re Berkeley's Trusts*, 193.

2. Executor—Chargeable with default of co-executor—Domicile.]— J. B., sr., and S. D., of Montreal, had been executors of C. B., who died in Montreal about 1844. S. D. proved the will in Ontario. The plaintiffs (two infants) were solely entitled under this will. J. B., sr., died in Montreal, in 1869. T. B. and J. B., jr., were his executors, and both proved the will in Ontario, but T. B.

alone acted as executor, J. B., jr., having given him a power of attorney to act for him in all matters relating to the estate. The plaintiffs and T. B. and J. B., jr., were each entitled to a one-third share under the will of J. B., sr. A suit was brought for the administration of both estates, and a receiver appointed. In taking the accounts before the Master S. D.'s attendance was dispensed with, as it appeared that none of the assets of C. B.'s estate in Ontario had come to his hands. The Master found E. B. and J. B., jr., who did not appear or file any accounts, indebted to the estates in about \$51,000. In default of evidence to shew that any of the assets came to their hands formed part of C. B.'s estate, the Master further found that the whole formed part of J. B., sr.'s estate. The decree ordered the executors to distinguish the assets of each estate, and notified them that in default the whole would be taken to belong to the estate of J. B., sr. T. B. having died, the suit was revived.

J. B., jr., applied to the Court for leave to open and retake the accounts, on the ground that he had been kept in ignorance of the proceedings by his co-executors. Leave was given him to surcharge and falsify. J. B., jr., now distinguished the assets of the two estates, and sought to be relieved from liability as to the estate of C. B., on the ground that he was not executor of that estate : as to the J. B., sr., estate, he also sought to be relieved in several respects. The Master's judgment is upon these points.

Held, that T. B., and J. B., jr., did not, by proving the will of J. B., sr., become executors of C. B., as J. B., sr., was not the sole or surviving executors of C. B.

Held, that J. B., jr., is liable for

the moneys of J. B., sr.'s estate, come to the hands of Thomas, whether before or after the proving of the will, or before or after the power of attorney.

Held, that the writ of attachment or registration issued in Quebec did not affect the assets in Ontario.

Held, that as the Ontario Bank shares, though subscribed for at Montreal, and at one time registered there were transferred to Bowmanville during the testator's life, and appeared in the stock register there only, they are Ontario assets. *Bloomfield v. Brooke*, 266.

3. *Trustee—Allowance to — Care of land—Evidence.*]—A Master has power to allow a lump sum to a trustee as his remuneration for the care and management of real estate, but to entitle him to such sum there ought to be evidence to enable the Court reasonably to see that the service for which such sum is asked have been rendered, and to make a proper allowance therefor. Where a Master fixed a sum, on evidence not sufficiently particular, the case, on appeal, was referred back to him, with leave to the trustee to give proper evidence. The trustees to pay the costs of the appeal and the additional costs in the Master's office. *Stinson v. Stinson*, 560.

See LIMITATIONS, STATUTE OF.

VACATION.

See MASTERS REPORT, 3.

VENDOR AND PURCHASER.

1. *Vendor and purchaser—Title by foreclosure—Presumption of death—R. S. O. ch. 109, sec. 3.]*—Where

a bill was served on a defendant personally, and about a year afterwards a final order of foreclosure was granted in the suit:

Held, that a purchaser was not entitled to insist on the plaintiff (the vendor) proving that the defendant was alive when the final order was made.

Held, also, that on application under R. S. O. ch. 109, the question of the abandonment of the contract between the parties cannot be raised. *Henderson v. Spencer*, 402.

VENUE.

1. *Pleading—Abatement—Bar—Jurisdiction.*]—The plaintiff brought his action for damages caused by the non-repair of a highway in the county of York, and laid the venue in Peel, but the declaration did not state in what county the highway was situate.

Defendant pleaded not guilty; and, 2—that the Court ought not to have further cognizance of the action, because the cause of action is local, and arose in the county of York and not in the county of Peel.

Held, that this was properly a defence *in bar*, and not *in abatement*. *Held*, that whether a plea *in abatement*, or *to the jurisdiction*, it could not be pleaded with a plea *in bar*.

The venue being admitted to be wrong, plaintiff was allowed to amend his declaration. *Brown v. The Corporation of the County of York*, 139.

2. *Sheriff—Venue.*]—In an action wherein the sheriff is plaintiff or defendant, the opposite party, if he so desires, may have the action tried in the county adjoining that in which the sheriff resides. *Brannen v. Jarvis*, 320.

VERDICT.

Verdict — Interest — Ascertained amount.]—In an action against the sureties of an absconding assignee in insolvency, on the assignees bond to the Queen under the statute, a verdict was entered at the trial for \$800, subject to a legal question, which was afterwards decided in favour of the plaintiff. It was agreed by the parties that in case of such a decision, the amount for which the verdict should be entered was \$700.

Held, that the verdict was not for a debt or sum certain within R. S. O. ch. 50, sec. 269, and that it should not carry interest from its entry. *Woodruff v. Canada Guarantee Co.* 532.

VESTING ORDER.

See SALE OF LAND BY ORDER OF THE COURT, 3—QUIETING TITLES, 6.

VOTING.

On Railway Bonds.]—See RAILWAY, 3.

WAIVER.

Notice to reply—Order for time to reply.]—The obtaining of an order for time to reply waives an objection that no notice to reply was served, and takes the place of such notice. *Lock v. Todd*, 60.

See Costs, 12.

WILL.

See IMPROVEMENTS.

WILL, CONSTRUCTION OF.

1. R. S. O ch. 109, sec. 3.]—A. devised land to his executors, “To hold the same in trust for the use and benefit of my son W. during his lifetime, and after the death of my son W. in trust for his heirs, issue of his body, until the youngest of said heirs shall become of age, and then to convey it to said heirs, the children of my said son W., taking equal shares, and the child or children of any deceased child of my said son to take their parent's share in equal proportion.”

Held, that W. took only an estate for life, and that the legal estate in remainder vested in the trustees for the benefit of his heirs. *In re Romanes & Smith*, 323.

2. A will directed an executor to pay A. for life “the interest, dividends, and profits of certain stock, and of the moneys into which the said stock might be changed.” Subsequently new stock was issued at par and 18 shares allotted to the executor. Not being accepted these new shares were sold and produced a premium of \$226.67, which was credited to the executor.

Held, that the premium was principal, and that A. was entitled only to the interest on it during her life. *Re John Thomas Smith*, 384.

WITHDRAWAL OF JUROR.

See JURY, 1.



